

COMMITTEE ON FOREIGN INVESTMENT  
IN THE UNITED STATES (CFIUS),  
ONE YEAR AFTER DUBAI PORTS WORLD

---

HEARING  
BEFORE THE  
COMMITTEE ON FINANCIAL SERVICES  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED TENTH CONGRESS  
FIRST SESSION

\_\_\_\_\_

FEBRUARY 07, 2007

\_\_\_\_\_

Printed for the use of the Committee on Financial Services

**Serial No. 110-2**



U.S. GOVERNMENT PRINTING OFFICE

34-672 PDF

WASHINGTON : 2007

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

## HOUSE COMMITTEE ON FINANCIAL SERVICES

BARNEY FRANK, Massachusetts, *Chairman*

PAUL E. KANJORSKI, Pennsylvania	SPENCER BACHUS, Alabama
MAXINE WATERS, California	RICHARD H. BAKER, Louisiana
CAROLYN B. MALONEY, New York	DEBORAH PRYCE, Ohio
LUIS V. GUTIERREZ, Illinois	MICHAEL N. CASTLE, Delaware
NYDIA M. VELAZQUEZ, New York	PETER T. KING, New York
MELVIN L. WATT, North Carolina	EDWARD R. ROYCE, California
GARY L. ACKERMAN, New York	FRANK D. LUCAS, Oklahoma
JULIA CARSON, Indiana	RON PAUL, Texas
BRAD SHERMAN, California	PAUL E. GILLMOR, Ohio
GREGORY W. MEEKS, New York	STEVEN C. LATOURETTE, Ohio
DENNIS MOORE, Kansas	DONALD A. MANZULLO, Illinois
MICHAEL E. CAPUANO, Massachusetts	WALTER B. JONES, Jr., North Carolina
RUBEN HINOJOSA, Texas	JUDY BIGGERT, Illinois
WM. LACY CLAY, Missouri	CHRISTOPHER SHAYS, Connecticut
CAROLYN MCCARTHY, New York	GARY G. MILLER, California
JOE BACA, California	SHELLEY MOORE CAPITO, West Virginia
STEPHEN F. LYNCH, Massachusetts	TOM FEENEY, Florida
BRAD MILLER, North Carolina	JEB HENSARLING, Texas
DAVID SCOTT, Georgia	SCOTT GARRETT, New Jersey
AL GREEN, Texas	GINNY BROWN-WAITE, Florida
EMANUEL CLEAVER, Missouri	J. GRESHAM BARRETT, South Carolina
MELISSA L. BEAN, Illinois	RICK RENZI, Arizona
GWEN MOORE, Wisconsin	JIM GERLACH, Pennsylvania
LINCOLN DAVIS, Tennessee	STEVAN PEARCE, New Mexico
ALBIO SIRES, New Jersey	RANDY NEUGEBAUER, Texas
PAUL W. HODES, New Hampshire	TOM PRICE, Georgia
KEITH ELLISON, Minnesota	GEOFF DAVIS, Kentucky
RON KLEIN, Florida	PATRICK T. McHENRY, North Carolina
TIM MAHONEY, Florida	JOHN CAMPBELL, California
CHARLES WILSON, Ohio	MARSHA BLACKBURN, Tennessee
ED PERLMUTTER, Colorado	ADAM PUTNAM, Florida
CHRISTOPHER S. MURPHY, Connecticut	MICHELE BACHMANN, Minnesota
JOE DONNELLY, Indiana	PETER J. ROSKAM, Illinois
ROBERT WEXLER, Florida	
JIM MARSHALL, Georgia	
DAN BOREN, Oklahoma	

JEANNE M. ROSLANOWICK, *Staff Director and Chief Counsel*

# CONTENTS

	Page
Hearing held on:	
February 7, 2007 .....	1
Appendix:	
February 7, 2007 .....	61

## WITNESSES

WEDNESDAY, FEBRUARY 7, 2007

Bartlett, Steve, President and CEO, Financial Services Roundtable .....	45
Heyman, David, Director, Homeland Security Program, Center for Strategic and International Studies .....	52
Lowery, Hon. Clay, Assistant Secretary, U.S. Department of the Treasury .....	5
Malan, Todd M., President and CEO, Organization for International Invest- ment .....	46
Marchick, David, partner, Covington and Burling .....	48
Nichols, Robert S., President and COO, Financial Services Forum .....	50
O'Hanlon, Michael, senior fellow, Foreign Policy Program, Brookings Institu- tion .....	47

## APPENDIX

Prepared statements:	
Brown-Waite, Hon. Ginny .....	62
Cleaver, Hon. Emanuel .....	63
Putnam, Hon. Adam H. ....	65
Pryce, Hon. Deborah .....	67
Waters, Hon. Maxine .....	69
Bartlett, Steve .....	74
Heyman, David .....	83
Lowery, Hon. Clay .....	88
Malan, Todd M. ....	93
Marchick, David .....	104
Nichols, Robert S. ....	132
O'Hanlon, Michael .....	163





**COMMITTEE ON FOREIGN INVESTMENT  
IN THE UNITED STATES (CFIUS),  
ONE YEAR AFTER DUBAI PORTS WORLD**

---

**Wednesday, February 7, 2007**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON FINANCIAL SERVICES,  
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Barney Frank [chairman of the committee] presiding.

Present: Representatives Frank, Waters, Maloney, Gutierrez, Velazquez, Watt, Sherman, Meeks, Moore of Kansas, Capuano, Clay, Baca, Green, Cleaver, Bean, Davis of Tennessee, Ellison, Klein, Mahoney, Wilson, Perlmutter, Donnelly, Wexler, Marshall, Boren; Bachus, Castle, Lucas, Paul, Jones, Biggert, Capito, Feeney, Hensarling, Garrett, Neugebauer, Davis of Kentucky, McHenry, Putnam, Blackburn, Bachmann, and Roskam.

Also present: Representative Crowley.

The CHAIRMAN. Today's hearing of the Committee on Financial Services will now come to order. This is a hearing on the legislation that will establish statutorily the Committee on Foreign Investment in the United States.

Let me ask unanimous consent that we limit opening statements to two and two. Two and two does not make three. There are three members of the committee here.

We will limit opening statements, if there is unanimous consent, to no more than the chairman and the ranking member of the full committee, and the ranking member of the subcommittee or their designees.

Is there any objection?

The Chair hears none. In light of the sparsity of the other attendees—I think we may have worn out members' capacity to sit in hearings, having sat from 10 a.m. to 6:30 p.m. yesterday on New Orleans—I would ask unanimous consent that our former colleague, who has moved on to better things, but decided to slum today and re-join us, be allowed to participate in the hearing, the gentleman from New York, Mr. Crowley.

Is there any objection?

Hearing none, Mr. Crowley will be allowed to participate.

With that, I'm going to turn to the ranking member, not of this subcommittee, but of the Subcommittee on Financial Institutions, Mrs. Maloney, who was the ranking member last year of the appro-

priate subcommittee. She has done major work on this. I will turn to her for an opening statement.

Mrs. MALONEY. I want to thank the chairman and ranking member for holding this hearing and for making it a priority, which it should be. I am delighted that we are moving forward with the bipartisan CFIUS reform bill, which protects national security and grows our economy by encouraging safe foreign investment.

This bill, which I introduced in the last Congress with Representatives Price, Crowley, and Blunt, has strong bipartisan support, including the chairman and ranking member of this committee, as well as Chairman Thompson and Ranking Member King of the Homeland Security Committee.

The Committee on Foreign Investment in the United States or CFIUS, an interagency group of 12 agencies headed by Treasury, were thrown into the spotlight by the Dubai Ports World debacle almost a year ago.

Suddenly, Congress found out that management of six of our largest ports had been sold to the Government of Dubai without any senior political officer knowing anything about it.

Clearly, the process by which foreign acquisitions in this country were reviewed lacked transparency and accountability. Our national security was not getting proper attention.

At the same time, I, and the other sponsors of this bill, believed strongly in the benefits of safe foreign investment, jobs in the United States, and greater opportunities for American business abroad.

The process for vetting foreign investments must not become so unwieldy or so uncertain that valuable foreign investment is needlessly discouraged, hampering economic growth.

Many observers, both domestic and foreign, think our bill has struck this balance successfully. This legislation proposes several important changes to the current regulations governing foreign investment to improve national security.

First, it will ensure that foreign-government-controlled entities will get special scrutiny. As we saw with Dubai Ports World, government-controlled entities may have agendas other than profit and may have access to funds far beyond those available to private companies to accomplish them.

Second, it will ensure that the top level political appointees in each participating department review and sign off on transactions so that there is a better opportunity for the exercise of judgment and more accountability.

There are also several aspects of the bill that provide greater certainty to the process, to improve the climate for safe foreign investment.

First, we have preserved the 30-day timeline, which is similar to other reviews, such as the anti-trust reviews, which industry regards as critical for most deals.

Second, the bill provides very restrictive rules for any re-opening of the CFIUS process.

Finally, the bill requires greater reporting to Congress, but only of all completed actions by CFIUS. The bill does not require reporting during the process since that injects unnecessary political risk and would severely chill safe foreign investment.

In sum, this bill is a sensible balanced approach to making sure foreign acquisitions do not jeopardize our national security while providing greater certainty and predictability to encourage safe foreign investment.

I urge my colleagues to support H.R. 556, and I look forward to the testimony and welcome today Mr. Lowery.

The CHAIRMAN. The Chair now recognizes the ranking member, the gentleman from Alabama.

Mr. BACHUS. Thank you, Chairman Frank. I certainly appreciate you scheduling this important hearing. Let me also thank Representative Maloney for introducing this legislation so early in the 110th Congress, and Representative Deborah Pryce, a member of our committee, for serving as an original co-sponsor.

Chairman Frank and I are also original co-sponsors of H.R. 556, which is identical to the legislation that passed the House by a margin of 424–0 last year. I think some changes we will make next week will even strengthen that bill.

Reform of the Nation's foreign investment vetting process became an issue last year when the Committee on Foreign Investment in the United States received criticism for failing to question the safety and security implications stemming from Dubai Ports World's purchase of commercial operations at several American ports.

Mr. Chairman, the key issues we face transcend the Dubai Ports World deal or CFIUS. H.R. 556 meets our challenges by advancing three important objectives.

The first objective is to encourage foreign investment in our economy. Legislation should do nothing to slow that investment or discourage it. The surest way to ensure that America remains strong and secure is to strengthen our economy and maintain global competitiveness.

While we should never underestimate the threat to U.S. interests from economic espionage or from critical technologies falling into the wrong hands, we must also recognize that discouraging intentionally or unwittingly foreign investment or otherwise restricting global capital flows poses a serious threat to our economic security and prosperity.

The second objective is transparency. Many Members of Congress learned of the Dubai Ports World situation from newspapers. This bill will ensure that as a matter of policy, CFIUS keeps Congress in the loop.

Third, we need empowerment of experts best qualified to assess national security issues. To that end, this bill ensures that the Director of National Intelligence can provide important and timely input to CFIUS based on the most current intelligence available, and guarantees that the Department of Homeland Security will be a full participant in the process.

Mr. Chairman, the world is a lot different than it was in 1975, when President Ford first created CFIUS. It is far different than in 1988, when the outline of the current review process was established.

Terrorism requires us to exercise increased vigilance while the demands of a global economy necessitate that America compete aggressively for foreign investment capital.

The “siren song” of protectionism is one that must be resisted if we are serious about maintaining America’s competitive standing in the world.

This bill modernizes the way CFIUS does business, ensuring that both our security and economic needs are met.

Once again, I congratulate the sponsors of this bill and look forward to working with them to move the legislation through our committee and through the House.

Thank you.

The CHAIRMAN. I’m a very strong supporter of this bill. I think it is a good thing that we have this bipartisan consensus. Foreign direct investment is a good thing for our economy.

There has been some confusion. Unfortunately, in the current context, the word “foreign” sometimes gets people a little jittery. That is an indication of why we need to make progress in dealing with excessive inequality. This should not be at all controversial, but I can understand why some people fear it.

If they look specifically at what we are talking about, it should be very clear that we are talking about people who do not live in America putting money here in direct investments, i.e., things that will create jobs.

It is true that we had a problem with the Dubai Ports situation. That was due to a lapse in judgment on the part of people in this Administration. Someone should have said to the people from Dubai that they are very nice people with whom we have no particular quarrel, but they should not take it personally if we explain to them that in the current context in the world, having people from their part of the world controlling shipping was likely to cause more trouble than it was worth. They should have been steered into other investments.

We should not allow that political misjudgment at the Administration level to cause us to skew a process which is on the whole good for us. Yes, there will be exceptional cases of national security, but they are exceptional.

I must say that many of the arguments I have seen based on national security result from particular groups in society understandably, but inaccurately, identifying their own economic wellbeing with national security.

We all like to think that our prosperity is somehow important, not just to us, but to society as a whole. That isn’t always the case. What we now have is a good set of rules that will allow us—the general rule will be to allow things in.

It is also obviously the case that if someone were investing money in America, the notion that your investment is going to have to sit and become a political football before some Congressional committee or somebody else for some period of time, it is unlikely to encourage you to invest here. We do not want to interfere with that process.

There have been amendments suggested that we are talking about. People should be on notice that we plan to mark up this bill in committee next week and have it on the Floor soon, I would hope, either next week or as soon as we come back from recess.

We hope to send the rest of the world a signal that we regard this as a place where they should feel comfortable in investing. Our

message to others in the world is bring us your money to create jobs and we will treat you and your money very nicely. That is the essential message of this legislation.

Mr. BACHUS. Any members who wish to make an opening statement?

The CHAIRMAN. We have one more statement available for the minority if anyone would like to make one, but it is not obligatory.

We will now proceed with our witnesses. We will begin with the representative of the Treasury. Let me say that I have spoken to Secretary Paulson and Undersecretary Kimmitt. We understand this is something that is being considered at the highest levels at Treasury, and we appreciate that.

The Treasury is represented here today by Clay Lowery, who is the Assistant Secretary for the Department of the Treasury. Mr. Lowery, please proceed. Your full statement will be, without objection, put into the record.

**STATEMENT OF THE HONORABLE CLAY LOWERY, ASSISTANT SECRETARY, U.S. DEPARTMENT OF THE TREASURY**

Mr. LOWERY. Thank you very much, Mr. Chairman, Ranking Member Bachus, Congresswoman Maloney, and the other distinguished members of the committee.

Your opening statements are actually very close to my statement. I will try to be very brief.

Today I am here to update the committee on the changes that we have made—

The CHAIRMAN. That is probably a good model for Treasury to follow for the future. I mean the similarity, not the brevity.

Mr. LOWERY. I want to update the committee on basically the process changes we have already made in the past year and how many of them reflect, actually, what is in the House bill.

In the last Congress, this committee was instrumental in shaping a CFIUS reform bill which passed the House unanimously. We believe the goals of this bill, “to ensure national security while promoting foreign investment and the creation and maintenance of jobs”, are consistent with the goals that the Administration has pursued in trying to strengthen the CFIUS process.

Based largely on concerns that were raised by the Congress, the Administration has made a number of changes in the past year, and while the list of changes is too many to go through in my oral testimony, I would like to highlight three of them in particular that came out of the Dubai Ports World transaction.

First, we have improved our communications with Congress. CFIUS now provides briefing materials on every single case for which action is concluded under the Exxon-Florio amendment. In addition, CFIUS provides periodic briefings to its oversight committees describing the cases investigated.

Second, to strengthen accountability, every case is now briefed up to the highest levels within CFIUS agencies, and only individuals who have been presidentially appointed and Senate confirmed can certify the conclusion of a CFIUS investigation.

Third, the role of the intelligence community has been formalized and enhanced. The Director of National Intelligence, using the 16 different intelligence agencies, examines every transaction, partici-

pates in all CFIUS meetings, and provides a broad and comprehensive threat assessment to the committee.

The legislation introduced by Congresswomen Maloney and Pryce and others covers many of these reforms. Last year in its newsletter, the Administration outlined concerns with the House and Senate bills, and my written testimony covers many of those issues.

Overall, we were very impressed by the efforts of the House in structuring a balanced bill that was done in such a bipartisan manner.

In my oral testimony, I would only want to point out two concerns that we have. As you will hear from your next panel, investors like clarity and certainty, which this bill helps provide.

However, some specific provisions could cause unnecessary bureaucratic delays that would extend investigations beyond the timeline set in the legislation.

For instance, not allowing the delegation of authority beyond the top two officials in an agency to conclude transactions on even the most routine cases is a recipe for delaying investigations based more on the rigidity of clearance processes than on the merits of a case.

In addition, such a formula will focus the attention of the most senior level officials on everything as opposed to having them focus on those priority cases that are of most concern.

Secondly, we agree that foreign-government-controlled cases should be given higher scrutiny by CFIUS. By requiring a potential 75-day investigation on all foreign-government-controlled cases, the legislation could take routine transactions that have little to do with national security and subject them to a drawn out process that could divert resources from other cases that need attention.

As members of this committee know, it is important that we get this right. Today, many firms and countries in the world are watching this process, and they are asking: "Is the United States closing its borders to investment and competition? Should we put our money and talent elsewhere? If the United States has a high process barrier to investment, we certainly can make ours even more onerous, or should we even take retaliatory action against U.S. firms in our countries if they take action against ours?"

We all realize that our primary goal is to protect national security, but we also need to protect open investment in the United States.

Traditionally, the United States has been one of the most open and attractive climates for investors to put their money. This openness creates competition, jobs, and wealth, and is the underpinning of our economic success.

To sum it up, we should never forget that a domestic climate conducive to foreign investment is also one of the keys to strengthening our national security.

Thank you very much. I will take any questions you have.

[The prepared statement of Hon. Clay Lowery can be found on page 88 of the appendix.]

The CHAIRMAN. Thank you, Mr. Lowery. We appreciate the conversations we have been having about those amendments. I believe we are going to be able to work out agreements on many of these issues.

I will now turn to Mrs. Maloney to begin the questioning.

Mrs. MALONEY. I appreciate your testimony, your meetings, the meeting of Secretary Paulson and others on this issue. I join the chairman in wanting to respond and work with you.

This bill was originally introduced because we were concerned that the CFIUS process did not adequately protect national security. I want to talk about national security just for a moment.

The Washington Post reported last Friday that Dubai Ports World, through its subsidiary, had bought the Hotel Washington on 15th Street. As you know, if you have been to the roof, it is only a stone's throw from the second floor residence of the White House.

I was struck by this because this is exactly the scenario that the Administration used last year as an example of a foreign government purchase that would be outside of CFIUS' review.

When I was urging them to take a broader view of the national security right after the Dubai Ports World, they said, well, we will look at ports, but we will not look at hotels. Yet this hotel is very close to the White House.

To my mind, I think this example illustrates exactly the criticism that the GAO has leveled at CFIUS in its October 5th report. They said that CFIUS took too narrow a view of national security by only focusing on defense-related sectors.

I am concerned that attitude encouraged companies not to submit deals to CFIUS, including deals that should have been reviewed. For example, when I urged CFIUS to review the purchase of the second largest voting machine company in the United States by a Venezuelan company, the company, SmartMatic, publicly took the position that they did not have to go through the CFIUS review, because a deal involving voting machines just was not a CFIUS issue period. I feel otherwise. I feel voting machines are part of our national security. As you know, this went on for months.

In this day and age, there are really no sectors that we can rule out as never posing a national security issue. I was glad to see that CFIUS gave the SmartMatic deal a careful review and the company has withdrawn its application and is selling Sequoia.

I am not saying that the Hotel Washington deal does pose an issue. I am sure you are on top of it. I think it does show that we need to have a broad and flexible definition of national security and not exclude any specific sector.

My question is what approach is CFIUS taking to this issue now? How does the committee define "national security" for purposes of its review? Are there any sectors that you now consider that are out of bounds?

Mr. LOWERY. Thank you for the question. The GAO, in 2005, part of its study, they believed that the CFIUS body and actually particularly the Treasury Department, was defining "national security" way too narrowly, and just doing it on defense issues.

We think the GAO had some points there. We are not sure we completely agree. Right now, if you look at the cases that CFIUS has taken on over the last year, there were 113 filings last year, which is basically the most since 1991, of those cases, roughly 25 percent of them were in the defense industry. About 60 percent probably were in what would best be described as a broad category

of critical infrastructure, including things like voting machines, ports, energy companies, and so forth.

We actually have tried to take a fairly flexible view. I can honestly say that in terms of national security, since the definitions of “national security” have clearly changed over time, 9/11 showed how much it can change, I think CFIUS has tried to change with that.

I think the GAO study was a good point of reference for us to make sure that we look at our procedures as carefully as possible.

We agree with you that a broad and flexible view of national security is necessary, and that is how we are trying to do things within CFIUS.

Mrs. MALONEY. What is Treasury’s view of the evergreen provisions?

Mr. LOWERY. I think the evergreen provision, which you will hear about clearly a lot on your next panel, is quite controversial.

I think our view is just like the legislation has, basically there needs to be procedural hurdles to putting something like that in place. It is a tough provision. I think that the legislation tries to get at that fairly well. That is how we are trying to view it within the Administration, which is it should be used in very rare circumstances.

I think that what we need to keep in mind is the importance of a good open investment climate, and I think the business community can talk about that better than I can.

Thirdly, and we do really need to reflect on this, what does it mean for our companies abroad. There are countries that look at certain provisions that we put in place or certain processes that we put in place and do they then submit our companies through the same processes.

I think our overall view is it should be used rarely and make sure that we have procedural steps to put a high hurdle in the legislation attempts to get at most of those issues.

The CHAIRMAN. The gentlewoman’s time has expired. The gentleman from Alabama.

Mr. BACHUS. Thank you, Assistant Secretary.

Looking at this bill, it is the same text that was introduced and went to the Floor and passed last year. Are you aware that at least two of the sections dealing with the Director of National Intelligence—one seems to give 30 days and one seems to give a different time period?

Have you corresponded about what you think would be the right approach on that?

Mr. LOWERY. We think that the bill did a good job of making sure that we formalize the process of the Director of National Intelligence. The Director of National Intelligence provides input into every single CFIUS transaction.

The only place we are worried about it is if it starts stepping into the policy role. I do not think the intelligence community thinks that is appropriate, and I do not think we think it is appropriate.

The second area is there is a provision in the bill about having a minimum of 30 days for the intelligence community to look at the reviews. I think this was an important attempt by Congress, and



I know the Homeland Security Committee, in particular, was interested in this issue.

The only problem with it, it was the right thing to do, the right attempt, but the only problem with it was that by putting in that minimum 30 days, you actually could undermine the structure of the bill, which is to try to clear out transactions within 30 days.

We have talked to the intelligence community. They actually right now are providing—it takes them roughly about 20 days to provide their intelligence assessment. Sometimes, a little less. Sometimes, a little more. That allows the CFIUS people to review what the intelligence community looks at, which is the threats of a transaction.

I think if we can provide a little more flexibility on that, that would be helpful, and we would be happy to work with the committee on that.

Mr. BACHUS. Take out one of the sections?

Mr. LOWERY. Yes. We would be happy to work with you on how to structure that better.

Mr. BACHUS. In the past, there have been concerns from some that the Treasury Department has ignored security related input from other CFIUS agencies in favor of encouraging foreign investment.

Was that ever true? Is it possible for the Department of the Treasury to overrule the views of the Defense Department? It's been reported.

Mr. LOWERY. The answer is no, in terms of overruling the Defense Department. Each agency basically can continue the investigation of a transaction if they have any concerns with that transaction, whether it is Defense, Justice, Homeland Security, or Treasury, for that matter.

Treasury takes national security concerns very seriously. Obviously, we want open investment in this country. I think people at the Department of Defense would say they want open investment in this country.

When I heard about this, I found it almost laughable that this was being applied, given the fact that a bunch of people at the Treasury Department are going to explain to the Secretary of Defense or the Defense Deputy Secretary what "national security" means.

It's incomprehensible. I do not know how we would be able to do it.

Instead, what we tried to do is chair the committee, but work as a team, together with Defense.

Mr. BACHUS. It seems like some of the legislation that was proposed last year is more protectionism than it is security related. It almost was trying to turn CFIUS into protectionist legislation as opposed to security related legislation.

Mr. LOWERY. That is our greatest concern. I will say that I felt the House did a very good job of trying to balance those issues. Obviously, we have a few small concerns. In general, I think the House tried to, in my view at least, stay away from those protectionist sentiments that could be there. I understand them.

You are right. National security is what we should be focused on, not protectionism.

Mr. BACHUS. There was a dramatic increase in CFIUS filings in 2006. Were all those necessary? Was there an unnecessary strain on your resources from all these filings?

Mr. LOWERY. I think the answer is that probably not all of them were necessary. I think there was an increase in the case filings for a few reasons.

First, frankly, the U.S. economy is going pretty well and people want to invest in the United States. Second, it kind of goes to Congresswoman Maloney's point, which is that we have a more flexible and broad definition of "national security."

Third, obviously, Dubai Ports World brought in a lot of attention to the CFIUS process, which increased a lot of filings, and finally fourth, by the nature of your question, you are right. There were some filings that were probably more defensive than anything else, filing for the sake of filing.

Obviously, that does stretch the resources more just because you have to look at every single case. We are trying to address that by increasing our resources. That is a concern and hopefully as we provide more clarity and certainty through a legislative process and through an executive order process at some point, that will help firms.

Mr. BACHUS. I do think the key is that Dubai really threw the foreign investment community into a lot of uncertainty. I think it restricted investment in the United States.

Mr. LOWERY. I agree with you. That is something that we have to be very careful about.

The CHAIRMAN. Thank you. There are three seats in the front row, and I am very much in favor of the public being able to sit. Since we do not expect to get any more witnesses, if people who are standing up want to come sit down, please feel free to do so. I regret the fact that the size of this committee restricts the availability of seats for the public. Essentially, given the way we finance the Congress, I will quote Ronald Reagan, "You paid for these chairs, you the taxpayers, you might as well sit in them."

Now I will go to the gentlewoman from California.

Ms. WATERS. Thank you very much, Mr. Chairman, members, and Congresswoman Maloney. I came over today, even though I have two committee hearings, because I wanted to make sure that I heard everything about this investment oversight, and whether or not Congress is doing enough to ensure that we are protected against terrorist threats.

I am particularly concerned about this issue. I think it was just yesterday that it was revealed that one of the members of the Iraqi Government was discovered to have been involved in terrorist activities.

What does that have to do with this? It simply says that if we are to fight terrorism, and if this is the number one issue of this Administration, we have to do it in every way possible, and we have to consider all that we do in terms of making our ports and any of our assets available in any way to any other countries, and any other investment opportunities.

I just want to make sure that we are doing our job and that we are raising the right kinds of questions. For example, is what we

are doing adequate and will this bill that is being proposed close the loopholes?

Mr. LOWERY. Let me try to answer that. We think that we have improved the process and strengthened it enormously over the last year. We think that the bill tries to draw the right balance between making sure that we protect national security and that we have an open investment process.

As to some of the holes that you mentioned, we think we have filled them pretty well. We are addressing a lot of the issues that Congresswoman Maloney raised in her points earlier about having a broad and flexible definition of national security.

I think the answer is yes, obviously, we need some tweaks here or there, but I think in general, we are filling the holes that you have identified.

Ms. WATERS. Let me just say that in reading over parts of your testimony, you indicate that foreign investment is key to our economic expansion and development. I want to make sure that foreign direct investment does not trump safety.

Mr. LOWERY. We agree completely.

Ms. WATERS. When you consider that we need, we want, and we encourage foreign investment, how far are you willing to go?

Mr. LOWERY. I think that is the process that CFIUS tries to address. We try to view the transactions that are of a national security concern, and the ones that are of the most national security concern, we try to address through either a very, very rigorous investigation, tough mitigation agreements in cases where we are trying to take risks, or potentially even not allowing those transactions to happen.

It is done on a case-by-case basis, which I think is best because otherwise you can get into an area where you start chilling foreign investment from coming into this country.

Ms. WATERS. Mr. Chairman, it appears that our ports are the most vulnerable in this war on terrorism and that the containers that come into this country are still not examined either in our ports or foreign ports. It is still a very, very limited operation.

How do we view foreign investment in relation to the lack of the technology and the ability to x-ray these containers?

Mr. LOWERY. You are probably going a little beyond my expertise. In terms of doing security on ports, that is the responsibility of our Port Authority, Customs, and Coast Guard. It actually is not the responsibility of investors.

The investors obviously have to do security at their fence line and things like that. I think what our Homeland Security Department is trying to do is trying to make sure that security does not start just at the U.S. border, but overseas.

I know they have worked very hard around the world with a number of countries, including the United Arab Emirates, to try to make sure that we have as secure a system as possible to prevent those very dangers that you are worried about.

Ms. WATERS. Thank you very much, Mr. Chairman.

The CHAIRMAN. Mr. Neugebauer.

Mr. NEUGEBAUER. Thank you, Mr. Chairman.

I was glad to hear you talk about the impact of foreign investment on our country. Secretary Lowery also talked about the im-

pact on investment that U.S. companies are making in other countries.

I think it is important for us all to remind ourselves that those create jobs in the United States in both ways. A lot of companies that are investing in foreign countries make those U.S. companies grow and certainly in the investment here.

Certainly, we want to make sure that this process does protect our national security, but also our economic security, and hopefully, I think this bill does it.

Mr. Secretary, I want to go to a point that you made, a couple of points you made. One was that you were concerned about the process that the top two agency folks had to be involved in that process.

Does this bill require them to be involved in it or just sign off on it? Would you elaborate on that a little bit?

Mr. LOWERY. Yes. That is a good question. The Secretary of the Treasury and the Deputy Secretary of Treasury, who are obviously my bosses, are involved in every single transaction. They are briefed. They are provided information.

What the bill does is go one step beyond that, and basically make them certify when we close out a transaction; they need to certify it. That is the only part we are a little worried about. The reason is because 30 days is a tight timeframe. We have always said that. That is what the GAO said in 2005.

We need to work through those processes as best we can, and keep the highest level officials informed, but we think that we can still get the accountability that Congress wants by having Senate confirmed officials, assistant secretaries, undersecretaries, and sometimes deputy secretaries sign off on all the transactions.

Our major focus is that we want to make sure that, in my case, my secretary and deputy secretary's time is most focused on those transactions that rise up to the largest concern, and not the routine cases.

We think a small adjustment could be made in the bill which allows for that to happen, but at the same time, makes sure that our highest level officials are still informed about what is going on.

Mr. NEUGEBAUER. Have you submitted some proposed language for that?

Mr. LOWERY. I am not sure if we have, but we would be happy to.

Mr. NEUGEBAUER. If you would, either to the ranking member or myself, we would be glad to take a look at that.

The reason I think that was important—I was wondering if in that language, it would be appropriate for the CFIUS Board itself to develop some criteria of when they think it is necessary that the higher level windows review those cases that are more routine.

I guess the second part of my question is, once a company has gone through that process, would you not think that would lower the—not necessarily lower the standard but in other words, streamline, I would call it a repeat customer.

Is that built into the flexibility in this bill, do you think?

Mr. LOWERY. Yes, actually, I do think that is the case. We do have a number of companies around the world that make a lot of investments in the United States and in areas—there are a num-

ber of U.K. firms, for instance, that invest in what I would say is defense production issues around the country.

They come through CFIUS on numerous occasions. They know the process very well. They understand it. I think all they want to do is make sure there is as much certainty as possible so they can understand why concerns arise, and as long as we can talk to them about it. I think the bill does build that in already; yes.

Mr. NEUGEBAUER. One of the things we were talking about a while ago is that one of the concerns is if we make our process too onerous, some countries might take an attitude that maybe they need to make it just as difficult for us to invest in their countries.

Have you seen since this whole Dubai Ports World thing, some other countries take—maybe not retaliatory—just stepping up their processes in some ways?

Mr. LOWERY. Yes. I think the next panel will be able to address it better than me. I do know that a number of countries around the world started looking at their own processes and actually, frankly, making them slightly more onerous.

I know that Russia has been basing some of its legislation on what has been going on in Congress, as well as Mexico, India, and a number of others. Even Canada, which is a country that is very open to investment, has been looking at some of its legislation.

As I said in my opening statement, the world is watching us. There is no question about that.

Mr. NEUGEBAUER. Thank you.

The CHAIRMAN. Next, Ms. Velazquez.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Secretary, while the CFIUS process is becoming more efficient, many cases have undergone long review time periods, including a few hot publicity cases, that lasted several months.

Do you think small businesses involved with the process can survive lengthy review periods given the fact that more than one-third of the patents are held by small businesses in the area of high tech?

Mr. LOWERY. Actually, that is a very good point. We do have to be careful because some of these long reviews cost money. They cost money because the firms that are being acquired and the acquiring firms have to spend resources on attorneys. They have to spend resources on investment advisors. They have to be careful about when the transactions close.

It falls upon us to make sure that we are doing our work as efficiently, effectively, and clearly as possible. I think that is what businesses want. They just want to know that what we are doing makes sense and does not sound arbitrary to them.

I think that is what we are trying to strive for, but I am not sure we have completely gotten it right. That is what we are trying to strive for.

Ms. VELAZQUEZ. Would you recommend any particular tools or policies that would expedite cases involving small businesses?

Mr. LOWERY. I think that the main thing we need to do is have a set process for everyone, and that process needs to have as little chance for bureaucratic delays as possible.

I think you will see the changes that we have suggested to the House bill try to get at that issue, to try to get rid of the bureau-

cratic delays while at the same time meet the goals that the Congress has set out.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Oklahoma.

Mr. LUCAS. Thank you, Mr. Chairman.

Mr. Secretary, considering the challenging world we live in at the present time, remind me for just a moment, if you would, about some of the factors that CFIUS typically considers when analyzing these transactions we have been talking about?

Mr. LOWERY. The first factor we look at is—we look at it from two forms. One, the threat of the actual investment. You are really looking at the nature of the acquirer, what is their link to the government they are coming from? What is the government's position on things like non-proliferation or on export controls, or on terrorism, and what is the company's relationship to those issues? A lot of them have obviously history here in the United States.

The second thing we try to look at is the vulnerabilities of the transaction itself, so we look at the assets that are being purchased. Are those assets in any way—can they undermine our national security?

Then we combine that together to figure out what is the overall risk of the transaction and can that risk be mitigated or not mitigated. That is what we are doing during our investigation process.

The types of transactions we usually look at are defense-related, like production. Some of the critical infrastructure areas, ports, obviously being a recent example. Some investment technology and communications' areas, and sometimes energy-related assets.

Mr. LUCAS. The reason I asked that, since the companies voluntarily seek this process, and we have had examples here today of the potential voting machine companies and hotels and those sorts of things, I guess my question is how many people does it take to provide the kind of scrutiny that we have touched on briefly at different times today, what kind of resources do you have now and with the increase in filings, are you able, in a timely fashion, under present law to do what you are doing, and where does this take us?

Mr. LOWERY. It is very tough. The number of filings rose by 75 percent last year, and my prediction is that it will go up again this year.

We want to look at transactions that are of the most national security concern. We need to be careful that we are not creating some sort of a screening process for foreign investors into areas that frankly do not raise national security issues.

That is why we have tried to be as clear as possible when we can be on the process and what we are talking about in terms of the substance.

In terms of our resources at Treasury, we have increased resources by, I would guess, threefold, in this area. What we have done is we have taken resources from other areas, but we wanted to make sure that we got this right.

The Dubai Ports World was a problem. Frankly, we do not feel like we handled it very well. We have talked to Congress about that extensively, and we want to make sure we do it better.

I know some of the other agencies, like Homeland Security and the Justice Department and Defense, have beefed up what they are doing as well.

I think we are getting there, but at some point there might be a call for more resources.

Mr. LUCAS. Thank you, Mr. Chairman. I yield back the balance of my time.

The CHAIRMAN. Next, the gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman. Mr. Secretary, thank you for being here.

I have some concern over the fact that there are over 80,000 Missouri jobs with subsidiaries that would fall in the category of overseas entities. It is a very difficult balancing act when you place national security alongside our economic and global interests.

Can you give what you might view as an adequate balancing of those two? In addition to what you mentioned in your statement, the Congressional notification and working with the committees of jurisdiction and so forth.

Mr. LOWERY. I can try. I agree that foreign investment in this country is very important to job creation, and frankly, to greater productivity. The jobs usually have a much higher salary.

What we have tried to do is to strive to keep those factors in mind while knowing that the most important factor is protecting our national security.

I think what we have tried to do is put reforms in place that make sense from an Executive Branch point of view in terms of keeping up processes in 30 days, which I think basically allows foreigners to invest in our country without being discriminated against because they just happen to be foreigners.

Basically, in the domestic sense, domestic investors have to invest—when they invest, they go through the Hart-Scott-Rodino process, which takes 30 days. Foreigners go through that, too, but now they also go through CFIUS.

If we can keep them kind of linked up together, you do not have any discrimination against foreigners from a time perspective, which is obviously important for investors, but at the same time, we can still take a look at the national security.

It is those types of balances we are trying to reflect. I think the House bill does a very good job of that. As I said in my statement earlier, we have a few tweaks that we think will help. I agree with you. It is a very tough balance and we want to get it right.

Mr. CLEAVER. You are comfortable with the direction we are moving?

Mr. LOWERY. Yes, sir.

Mr. CLEAVER. Hallmark Cards, Sprint, or corporations in my home district, headquartered in my home district, both of whom are involved worldwide, I think the Dubai situation poisoned the atmosphere so that my constituents are concerned now about everything. They want to have greeting cards inspected, to see if there are any hidden messages about Christmas.

We have to win back the confidence of the American public with regard to this whole issue of foreign investment.

Mr. LOWERY. We agree. Actually, that is why I think we are very supportive of what the House and the Senate have been trying to do. We think, one, that will help win back the confidence.

First, we have to win back our own confidence within the Executive Branch, then we have to win Congress' confidence that we are doing the right things, and then finally and most importantly, we have to win the American people's confidence that we are doing things right.

I think that is why it is important that we continue to work with Congress on getting a very solid bill that protects national security but also ensures an open investment climate.

I agree with you. I understand where your constituents are coming from. I think we can strike the right balance.

Mr. CLEAVER. I yield back the balance of my time.

The CHAIRMAN. I waive my time but I will just take one minute of it now, because I was intrigued by one thing you said, namely the process of winning back your own confidence.

Did you buy a lot of self help books? How did the White House win back—it is sort of like how you got your groove back. I am just interested in how you won back your own confidence.

Mr. LOWERY. Dubai Ports World, we did some things right but we clearly did some things wrong. It was tough. We went through that process. I think we wanted to make sure we put it—the reason why we reformed our internal processes, both within the Treasury Department and CFIUS as a body, was in many respects to get our own confidence back, so that we make sure that we are doing this right, so the President is confident that his people are doing the right things, so that the Cabinet members are confident.

I stick by my statement even though it does sound a little strange.

The CHAIRMAN. That is a more thoughtful answer than my question deserved, and I appreciate it.

The gentlewoman from West Virginia.

Ms. CAPUTO. Thank you, Mr. Chairman.

Mr. Secretary, you sort of touched on this in your past statements. I think the reason that Members of Congress were so concerned about the Dubai Ports World was that the Administration seemed to be sort of back on their heels, and a lot of Members of Congress were caught unaware.

I know you have made some changes in your remarks to try to alleviate that. What kind of changes have been made? Is it more communication with Congress? More public statements?

Mr. LOWERY. There have been a number of changes. I think the three key ones that were probably the biggest criticism of Dubai Ports World, first, our communications with Congress were not there. They did not really exist. I think that we tried to improve that by making sure Congress is informed on every single transaction we do, and that we do periodic oral briefings. We have tried very hard to increase our communications.

Secondly, to make sure that the accountability was right. One of the concerns was, in my case, Secretary Snow did not know about this transaction. We make sure that Secretary Paulson and Deputy Secretary Kimmitt are aware of every single transaction, and that



a presidentially appointed Senate confirmed person has signed off and closed out a transaction.

So that Congress knows it has accountability because those are the people who are most accountable to Congress, frankly.

Third is getting the intelligence community involved. The intelligence community has always been involved in CFIUS but what we did was formalize the process, made sure they are involved in every transaction, and then we broadened it.

By having the Director of National Intelligence bring in all the intelligence agencies, we think that we have made that process even more robust than it was before.

Those are the three key ones. We have a bunch of other ones that are a little more procedural, but I think those are the key concerns that came out of the Dubai Ports World transaction.

Ms. CAPUTO. Thank you. I have one additional question as to the process. When you are doing your reviews and you find you need to go to a second review, do you go back to the foreign investor and say there are certain mitigating issues here that you need to change or clarify?

How does that procedure move forward?

Mr. LOWERY. The way it works is basically we do an investigation during the first 30-day process. That includes the intelligence community looking at the threats for us, and all the agencies, particularly the ones with specific expertise, like if it is a defense production issue, the Department of Defense is going to play much more of a strong role, looking at the vulnerabilities.

If at the end of that 30 days, we have not been able to answer all of our questions or there are concerns we have that frankly, we have not figured out how to address, that is when you will see us going into the second stage of the investigation.

During that second stage, sometimes all it is, is just asking a lot more questions to make sure we are comfortable. A lot of times what it is, is that one of the lead agencies, like Defense or Homeland Security, will take a negotiating role with the companies on doing mitigation agreements, because they see a risk and they want to figure out how do you mitigate that. That is what those mitigation agreements are all about.

That is basically what happens.

Ms. CAPUTO. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Davis.

Mr. DAVIS OF TENNESSEE. Thank you, Mr. Chairman.

I live in rural central Tennessee and part of east Tennessee. We have had a lot of investment there in manufacturing that is certainly welcomed.

When the Dubai Ports World situation arose, it became pretty much a political issue in our State, as well as in all States across this Nation, and a concern, were we really guarding the hen's nest from the fox?

When I look at that investment, I sometimes wonder exactly how many dollars are flowing into America percentage-wise of investment, job creation, real estate assets of America, and then I wonder also how much investment are we making as Americans in other countries, how much are we investing of our dollars into foreign assets in other countries? I have never been given a figure. Could you

somehow relate to me approximately what percentage of investment in America is being made by foreign investors?

I know when you look at debt, we have a lot of investment being made by several countries into our debt in this country, which kind of frightens me a little bit.

I also have a concern in exactly how much assets percentage-wise of America assets are owned by foreign investors, and then on the other hand, how many dollars do we have, how much do we invest in other countries percentage-wise from corporate America?

Mr. LOWERY. Off the top of my head, there are different ways of investing, obviously. There is foreign direct investment and there is portfolio investment and investing in debt markets.

I do not have all the numbers off the top of my head. Frankly, we can get those for you. Right now, there is probably \$100- to \$150 billion of foreign direct investment that comes into the United States. This goes in bits and pieces. It is much more than it was at earlier points in the 1990's. It increased as the stock market increased back in early 2000. You kind of see flows that go up.

Overall, the United States' firms on a stock basis, I believe, have \$2.5 trillion, I want to say, of assets abroad, and foreigners have, I think, about \$1.9- or \$2 trillion of assets here in the United States. That is on a stock basis.

We can get you some of the numbers. There are different ways of measuring it, FDI, equity investments, and then debt investments.

Mr. DAVIS OF TENNESSEE. Roughly \$1.9 trillion of investments in the country and we invest roughly \$2.5 trillion outside of our country?

Mr. LOWERY. On a stock basis, direct investment.

Mr. DAVIS OF TENNESSEE. What are our total assets in the country?

Mr. LOWERY. That is where I need to get back to you on that one. The answer is foreign companies employ in the United States about, I think, 5 percent of our workforce through direct investment. That kind of gives you a rough idea of what is going on.

Mr. DAVIS OF TENNESSEE. I have been reading lately where many investment firms, some that deal with pensions and otherwise, have been investing more in foreign investments from our country assets here, the stock market in New York.

Do we have something to fear there, what is happening there? Do you have an answer on how we reverse that?

Mr. LOWERY. I think having foreigners invest in our stock market or in our debt markets is an important thing. Our markets are extremely deep, very liquid. There has sometimes been concern about whether or not foreign governments own too many T-bills.

I think if you look at the numbers, the numbers are pretty overwhelming on how much is going actually on, on a daily basis, in terms of turnover, so that it is very hard to see how any country could cause major disruptions.

At the same time, it is something that we keep an eye on very closely at the Treasury Department. It is not my area, but we do have people at Treasury who look at it very carefully.

In the end, it is good that people invest in this country. That is why we have a fairly large capital accounts surplus.

Mr. DAVIS OF TENNESSEE. In the last 6 years, a \$3.7 trillion increase in national debt, a lot purchased by foreign countries, and that does frighten me. I think it does a lot of people who live in this country who are following what is going on in the country.

I have also always been concerned that when I look at the auto industry, for instance—we are able to build an automobile in America, make a profit, whether it is Nissan, that is in my district, very welcome, do a wonderful job, and employees are excited about having a great job with them.

Is there some way you can enlighten me? How can foreign automobile manufacturers and in high tech come to this country, pay roughly the same for jobs, earn a profit, continue to sell automobiles, and America automobile companies cannot?

Is there something I am missing there? Are there some breaks for foreign investors? What is going on?

Mr. LOWERY. I think you are getting beyond my expertise. I think a lot of companies that have invested in your district and other districts and have brought their expertise and their technology over here, they make products that are good products, and people in the United States want to consume those products.

I am not saying that—Ford and GM also make very good products, but different tastes and things like that.

I do not think that if somebody buys a Nissan car from your district, I do not think they are necessarily making a judgment that they like Japan greater than the United States. They just happen to think that car is a better car than whatever the other cars were they were looking at.

Mr. DAVIS OF TENNESSEE. Thank you, Mr. Chairman. Thank you, Mr. Lowery.

The CHAIRMAN. I would just ask unanimous consent that the ranking member and I may speak out of order for a minute. With no objection, Ranking Member Bachus.

Mr. BACHUS. Thank you. If I could just ask for a unanimous consent request. I would like to say for the record, someone needs to say during this hearing that Dubai, the country of Dubai, in fact the United Arab Emirates, the Emirates are our allies. They are our strong allies.

They are our allies at great risk to their own national security. I, for one—I cannot speak for the other members of this committee—strongly welcome and encourage their investments in the United States.

In our attempts to maintain—my third point—in our attempts to maintain friendly and good relations with the Middle Eastern countries, I believe their investments in the United States are key and are very beneficial.

One of my regrets in the Dubai Ports' deal is there are some, not only in the Arab countries, but around the world, who are questioning our commitment to open investment and to a cooperative spirit and a competitive environment.

Thank you.

The CHAIRMAN. I would just join the gentleman in that my own view was that it was a mistake to let Dubai purchase ports, but in fact, they should be encouraged to buy other things. I would say

personally myself, I would have no objection to them buying a hotel.

A reasonable question, we should be clear. Nothing in our law gives foreign direct investment any advantage or exemption from American law. If you are a foreign company and you invest in America, you are clearly governed by every law, every environmental regulation, and every State law. There is no exemption in that regard.

We are not talking about a policy which gives any favored treatment to foreign investment. They are fully covered by every local, State, and Federal statute and regulation. There is no diminution of the reach of American law.

Now we go to the gentlewoman of Tennessee.

Ms. BLACKBURN. Thank you, Mr. Chairman. Mr. Secretary, thank you for your time. I appreciate your succinct responses to the questions, whether they pertain to the legislation or not. I also appreciate your recognition of the fact that political freedom and economic freedom are inextricably linked. Indeed, in our constituents' minds, national security and economic security are linked.

You answered one of my questions with Mr. Neugebauer. I will look forward to seeing the language that you submit.

I will add just as a point of reference, I do agree with you that the world is watching what we do. I was talking with one of my constituent companies yesterday who is working to do something in another country. They noted to me the amount of due diligence that was now being required and that was indeed a change.

I also think it is important to note that while we appreciate the involvement that is there from a committee and a panel, it is important to note that our constituents want our eyes on this matter because they do think that national security is of prime importance and protecting the environment that we have here, and hopefully, as you mentioned earlier, there will be additional clarity and also some certainty to the process as we go through codifying something and placing it into law.

I want to give you an opportunity just to briefly make one statement, if you will; this is on recommendations. The process that we go through with CFIUS at this point, the President can still override that. You may want to talk about the difference between a recommendation and something that is binding.

Mr. LOWERY. Thank you. Yes. The way the process works is the only person who can actually order either the divestment or the blocking of a transaction is the President.

Obviously, you want to use it in the most rare circumstances, where there is a national security threat that simply just cannot be addressed or mitigated.

The bill has done a good job of structuring the process, kind of a layer of responsibility, which is in the 30-day process, that is where all the transactions will happen, and you should have accountability, but it does not have to be, obviously, the President. We would argue that it can be presidentially appointed Senate confirmed positions.

However, it also does mean that all CFIUS agencies, not just the Treasury Department, have responsibilities to make sure if there

are concerns that cannot be mitigated, they need to be prepared to put it into the second stage of investigation.

In the second stage of investigation, we believe that you can have the deputy secretaries and the secretaries. That is where they need to focus their attention, if there were concerns about a transaction, and those are the ones that were having to scrub even harder than the first set.

Finally, and the bill again does a good job on this, going to the President, you only go to the President basically in two types of circumstances.

The first is if you are saying our recommendation to the President is that we divest this or block this transaction from happening, and the second is if there is a split vote, frankly. Some agencies believe this and some believe that. We just need the President to work that out.

At that point, if the President gets involved and does that, there will be always a report sent to Congress at the end of his period of reflection. He is the one who makes the ultimate decision on the most difficult transactions. I do not know if I answered your question but I tried to.

Ms. BLACKBURN. Yes, you did. I think it is important to note just for the understanding of our constituents who watch the hearing and are concerned about these issues that we are discussing a recommendation process.

I thank you for the additional clarification. I yield back.

The CHAIRMAN. I thank the gentlewoman. We now will recognize the gentleman from Florida, Mr. Klein.

Mr. KLEIN. Thank you, Mr. Chairman. Thank you for being here today.

I represent South Florida, which has two major ports in my district, and of course, the Port of Miami is in the region. There was a lot of concern last year about the impact of the Dubai Ports World transaction in that part of the State, that part of the country.

A lot of the confusion, of course, came from ownership issues, operations issues, threat issues, and strategic assessments of exactly how this would play out and what impact it would have on port operations, what was coming into the port, what was going out of the port, and all those kinds of things.

We understand that there is the foreign investment side, and obviously, we are an open country that does rely on this, and a lot of foreign companies operate in South Florida and other parts of the country, where they employ a lot of people.

There is this balance. Again, what I would like is a little more information from you.

If you can address us as to how the Administration is helping balance the concern for the foreign investment side versus what, in our local communities we believe are issues, whether it happens to be in Washington or in our home communities, when you have a port, a large port in a community, with fuel farms and lots of things coming and going, cargo is coming and going out of the ports and onto the highways, the rail systems, right in residential communities and businesses.

How can we balance that, and how can we get to the point where people feel truly that there is an assessment going on that will not create a threat to the local communities?

Mr. LOWERY. That is an excellent question. It is the thing that we have to be most focused on. I actually hate saying that there is a balance between national security and foreign investment. I say it all the time. I hate saying it.

There is no balance. It is national security as our foremost concern.

I believe that open investment helps increase economic growth which I think is also in our national security interest, so it is not a balance, it is part of it.

In terms of how we actually address security concerns, there are lots of different methods. CFIUS is only a small portion of them, frankly.

For instance, let's talk about ports. Ports are secured not by the foreigners who invest in those ports. They cannot be, because if you look around the country, most ports have terminal operators that are foreign based. That is just a fact.

That is because our ports are not secured by them. Our ports are secured by Customs, by the Port Authorities, and then by the Coast Guard. That is how we are trying to—I am not an expert on this. That is how you try to address the port security.

You do not try necessarily to secure it through the CFIUS process, which is about mergers and acquisitions. Instead, CFIUS basically looks at a transaction that is going to happen and then takes a look and figures out if there is a national security concern, and if there is one, how do we address that national security concern.

In terms of actual day-to-day security, that is being done by lots of different factors, but usually by local, sometimes by Federal or State Governments.

Mr. KLEIN. Mr. Chairman and Mr. Lowery, the issue, I think, for many people is the sharing of information. We understand that whether it is the Coast Guard or whether it is other military services that are providing Customs or some of the strategic things, the issue is foreign companies, foreign interests, who may not necessarily—maybe today, they are in the right hands and maybe tomorrow you have interests that own these companies or have access to information from these companies that may be shared from the Port of Miami to somewhere overseas in terms of what is coming, what is going, what the assets are going in and out, and what the testing and the security procedures are.

These are the breakdowns that I think people are concerned about. To the extent that this information could be shared, obviously, the Customs people are communicating with the port operators. It is not like they are doing it in a vacuum. They are communicating how it is working, what the processes are, and how we, as a Nation, are securing our ports.

To the extent that this information is shared with interests that today may be favorable to the United States, tomorrow, you may have a group of people out there who are taking this information and using it against the United States and against our local security interests.

It is the snapshot today that the CFIUS procedure looks at and that can change in a matter of days or months or years.

Mr. LOWERY. I think those are good questions. You are asking somebody, unfortunately, who does not know how completely Customs does its job and the Coast Guard does their job.

I imagine that while they do share certain information, they have to talk to the port operators that are handling the business, they actually—because they are very security conscious or they mix things up, they make sure—they are only seeing a window of what is actually happening.

I think that obviously these are questions that people at Customs can answer much better than I can.

Mr. KLEIN. Mr. Chairman, my point would be that you and your colleagues should understand the process by which security works at the airports, what information is actually shared in terms of strategies of security with port operators.

If you are considering a transaction and saying it is good or it is not good, and you do not understand what the procedures are for what information is actually shared and what could be at risk, I think we have a problem.

That is where you need to be fully knowledgeable and the process we have needs to be one in which there is full knowledge before you can say this transaction should go forward or not.

Mr. LOWERY. That is a good question. That is why, by the way, CFIUS is an interagency process. You have 12 agencies. Six of them are the Commerce Department, the State Department, the Department of the Treasury, the Justice Department, the Department of Homeland Security, and the Defense Department. Let me just talk about Defense and Homeland Security for a second.

The CHAIRMAN. Quickly.

Mr. LOWERY. The Defense Department actually takes every transaction and submits it to 22 different groups within Defense—all three of the Service branches plus all the different types of people who worry about things at Defense. Homeland Security, which looks over Customs and the Coast Guard, submits anything that has to do with a port to Customs and the Coast Guard. The idea is to have the real national security experts look at those transactions. I am a Treasury Department official.

The CHAIRMAN. Mr. Lowery, we have a mark-up on this bill in a week. I think it would be very helpful if you and your colleagues would send to every member of this committee a mock-up of how a request that might implicate national security would be handled—give us all the process.

Secondly, I am going to offer some free investment advice to foreigners. If somebody tries to sell you a port, save your time and money and go buy something else. Nobody is selling anybody any ports in America for a long time to come. Go buy something else.

I think it would be helpful, as you were starting to explain orally, to show us how that would work. I think that would be very helpful to members of the committee.

Mr. Roskam is next, the gentleman from Illinois.

Mr. ROSKAM. Thank you, Mr. Chairman.

Can you give me the benefit of the current criterion that you use in CFIUS and how that contrasts to the proposed bill?

Mr. LOWERY. The criterion for how we view a transaction?

Mr. ROSKAM. Right. What would be a transaction that would rise to the level of concern?

Mr. LOWERY. What we try to do, as I said earlier, is try to focus on the threats of a transaction. What we do there is we are looking at who is acquiring it or what is their relationship to the government of that country. What is the government's relationship to the United States? Does this company or country have something in their past that gives us concerns in terms of things like non-proliferation, terrorism, or export control violations? That is where we use this interagency process that I was mentioning, plus our intelligence community to look at those types of things.

Mr. ROSKAM. Is there a list? Is that an identified criterion, A, B, C, D, and E?

Mr. LOWERY. Some of the list is actually in the actual legislation. Some of it is in just the practice that we use, whether it is our intelligence community or whether it is the actual agencies and how they are looking at transactions.

They are usually going through a set of criteria about, as I said, who is the acquirer, but also what are the assets that are being acquired, and what is the vulnerability of those assets.

Each agency brings different types of expertise to the table, and it depends obviously on the specific transaction that is being done, as to which agency probably has the most types of expertise.

If it was a port transaction, people at Customs are going to know a lot more than the rest of us are going to know, and the Coast Guard is going to know a lot more.

Those are the type of criteria. In terms of the overall criteria, we are looking at many areas revolving around defense, plus some critical infrastructure areas, things like ports and energy assets, and then also things around telecommunications and information technology, just because of the way it works on such a global basis.

Mr. ROSKAM. Things like food safety, for example? Is that in the mix?

Mr. LOWERY. I am trying to think if there has ever been something like that that I have seen. It could be technically. For instance, there are lots of purchases that happen of food manufacturers or frankly restaurants or something like that from abroad that probably would not go through CFIUS.

If there was something that got into food safety, or if we saw a transaction that got into food safety, I could see us getting involved. That could be considered critical infrastructure.

Mr. ROSKAM. Animal feed production, that kind of stuff.

Mr. LOWERY. I think so. It is rare. I remember a couple of times. One thing, CFIUS has 12 agencies, but we can bring other agencies with expertise to the table. I do know of a couple of times where we brought the Department of Agriculture in to take a look at something because we were not completely sure, or the Department of Health and Human Services because of those types of issues.

Mr. ROSKAM. If CFIUS has been implemented, or being contemplated under this bill that we are discussing today, is there a review process, like a subsequent review process?

In other words, I would assume, maybe I am incorrectly assuming, but I would assume that once somebody sort of gets the lami-



nated get out of jail free card that says come on in, you are free to do whatever you want, do we review that? Do we audit that? Do we follow up at any level? How does that work?

Mr. LOWERY. If the transaction was passed through the system and closed, and there was no mitigation measures in place, then the review—there would not be further reviews and audits and things like that. That would take up a ton of resources.

However, if there is a case where there was a risk that had been identified and one of the agencies had put in place a mitigation agreement to mitigate those risks, we do monitor those transactions.

We are monitoring basically that mitigation agreement, to make sure that there are no violations of the agreement, that they are living up to what they are doing. That is done through audits and reports and spot checks and things like that.

Mr. ROSKAM. Last question. Does it make any sense in the environment where there is not a mitigation agreement, let's say, you know, they connected all the dots, they crossed every "t," they dotted every "i," and they checked off every box and everybody said okay, but there is just something about it.

Is there something, is there a process by which that can be reviewed or once it is gone, you sort of lose jurisdiction and it has to be subsequently renewed?

Mr. LOWERY. It goes to the chairman's point earlier, which is that the companies are still subject to all the U.S. laws and regulations if they are here in this country.

If they get a get out of jail free card, you will hear people call it the safe harbor, then CFIUS is basically done.

That does not mean that the companies are not subject to all the laws and regulations that still go on in this country and that all our enforcement agencies can do things depending on what happens with that company.

Mr. ROSKAM. I understand. In terms of the purposes of CFIUS, it is over, and it is not going to be—there is not a reach back provision?

Mr. LOWERY. There is not a reach back provision except for—I cannot remember who asked me earlier, I think it was the ranking member—the evergreen provision. It is used in extremely rare circumstances, and there is a little bit of reach back in that.

As you will hear from the business community, it is something that is very controversial and should be used in rare circumstances. I think the legislation has tried to address that circumstance.

The CHAIRMAN. If the gentleman would yield. The other point would be this, and I think this is relevant, if in fact the later information led you to conclude there had been an incomplete furnishing of information originally, that would justify going back, that is you would then not be changing your position, but you would be able to assert that the original certification was invalid. I assume we have that power.

Mr. LOWERY. That is correct.

The CHAIRMAN. If you found something out that they had not fully revealed or that would have been relevant at the time, then you would in fact have the right, I think, to invalidate the transaction without any liability.

Mr. ROSKAM. This is all a voluntary filing right now; is that correct?

Mr. LOWERY. That is correct.

Mr. ROSKAM. What is the hammer?

Mr. LOWERY. The hammer on not filing? The major hammer is the fact that you put at risk your own transaction, and the risk is that CFIUS—the Executive Branch has the ability to go to any particular transaction that did not go through the process.

We follow the mergers and acquisitions press pretty carefully, but if there was a transaction that we did not catch, we can always go back to that transaction and basically pull them into CFIUS. Remember, at that point you have this kind of ultimate club of a potential divestment which for a company is extremely onerous.

Mr. ROSKAM. Huge.

Mr. LOWERY. You always have that club. It is always in the best interest of companies to file. Obviously, if it has nothing to do with national security, it does not make sense to file. There are issues that evolve around national security which are mainly outlined in the legislation, which I think most companies understand.

The CHAIRMAN. Will the gentleman yield? There is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds.

Mr. ROSKAM. By filing and getting a clean bill of health, so to speak, is there estoppel against subsequent action from an agency?

Mr. LOWERY. I'm sorry?

Mr. ROSKAM. In other words—

The CHAIRMAN. The gentleman from Illinois wants to hear you use a specific legal term, and we are going to provide him with an interpreter for non-lawyers. We are going to give him some help here.

Mr. ROSKAM. Okay. Here's the question.

The CHAIRMAN. Are you legally prevented from going back to it?

Mr. LOWERY. CFIUS would not go back to a transaction, but if there was something that was a problem—outside of what the chairman said about material omission or co-mission, then CFIUS could not go back to that transaction. However, again, other agencies might take an action against it for other enforcement reasons.

Mr. ROSKAM. You answered that question. Here's the real question. If CFIUS signs off on it, if it is materially complete and there is no fraud, there is no deception, and CFIUS signs off on it, let's say you have some person 6 months later who is reviewing a transaction related to it at the Commerce Department, for example, who says, "Oh, my goodness, I cannot believe this went through. This is outrageous."

Subsequently, it goes up the food chain. It is, in fact, outrageous. Does the fact that it has gone through CFIUS and it has the CFIUS intimated, does this prevent the Executive Branch from pursuing something, or does it just make it awkward?

Mr. LOWERY. No. It does not make it awkward nor does it prevent—

Mr. ROSKAM. It would make it awkward but hopefully—

Mr. LOWERY. Not necessarily. It depends on what that issue was. If it is Commerce, and I know you are just using it as an example, it is more along the lines of an export control violation.

Remember that CFIUS, the way the law reads is that CFIUS is actually kind of a stop gap. We should be using every single law and regulation that exists, and only if we don't have something do you use CFIUS.

The CHAIRMAN. I appreciate these questions. I think the answer is that you can always run into the unscramble the egg question, but I think the fact that you have been through CFIUS in legal terms neither adds to nor detracts from a subsequent ability to deal with it.

The other thing you said, would it be awkward? No, I think it would be one more occasion where they would get their confidence back and be able to recover.

I think the gentleman's questions were quite helpful. Now we go to the gentleman from Colorado.

Mr. PERLMUTTER. Thank you, Mr. Chairman. You answered a lot of my questions with your conversations with Representative Klein and Representative Roskam.

I have a couple of questions. First, where are you in the chain of command in one of these processes?

Mr. LOWERY. I chair basically the committee on what we call—I do not know if it means anything—the policy level, which is basically the assistant secretary level.

I report directly to the Deputy Secretary and the Secretary of Treasury.

Mr. PERLMUTTER. Do you get involved in determining whether a transaction is appropriate or not appropriate? Are you in that decision process?

Mr. LOWERY. Yes, but I am one of hundreds.

Mr. PERLMUTTER. I am on one of the committees in Homeland Security. We have had some questions on a number of toll roads across the country are in financial distress.

There are various countries and companies from around the world looking at buying or managing or doing both with respect to the toll roads.

Would that be a subject area for this process of review?

Mr. LOWERY. It could be. For instance, the Dulles Toll Road is owned or operated by an Australian firm. I do not think we looked at that; I do not think, frankly, that there was any reason for us to look at it.

You could see something where there could be a national security reason.

Mr. PERLMUTTER. It has come up in Homeland Security because a number of these toll roads, for instance, in my area in Colorado, one toll road is right near a big base that controls all our spy satellites. That would be the kind of thing that might trigger a review by your group?

Mr. LOWERY. That is correct. Homeland Security does look and think about those issues very carefully. All of the agencies are very involved in our process. Homeland Security is probably the most engaged agency by far.

Mr. PERLMUTTER. Thank you, Mr. Chairman. I yield back my time.

The CHAIRMAN. Thank you. Ms. Bachmann.

Ms. BACHMANN. Thank you, Mr. Chairman. Thank you, Mr. Secretary, for being here. I have learned a lot today. This has been wonderful and I appreciate your responsiveness to the questions.

One question that I had is that it is my understanding that the Director of National Intelligence is not a member of CFIUS. Could you comment, Mr. Secretary, on the current role that the Director of National Intelligence plays and specifically, does he have sufficient time to be able to review some of the transactions that come before CFIUS?

Mr. LOWERY. It is a very good question. The Director of National Intelligence is involved in every transaction as what was best described as an input valve. They give us information on what the intelligence community believes are the threats of a particular transaction.

They are not involved on the policy role and they are not making the final decisions. They would tell you, I think, not to speak for them, and I have talked to them about this, do they have enough time, and the answer is yes. There is a reason why.

First, and this was actually before Dubai Ports, we made a change in our processes to go out to the community that kind of handles CFIUS—there is a kind of CFIUS community out there—and told them it makes the most sense to come in as early as possible to do filings and actually do pre-filings.

In other words, you do not give us all the information but you give us a certain amount of information. That allows the intelligence community to start doing its process.

The intelligence community just yesterday was telling me that they basically need 15 to 20 days of time to do a transaction. That way, they can go out to all 16 intelligence community agencies, and get input. Usually, they basically meet amongst themselves and discuss the case, and then provide the reaction to the committee as a whole.

They are extremely well involved. I think they have enough time. We need to be careful, as I said in my testimony, one of the worries we had in the legislation is that there is a minimum requirement of 30 days. We do not think that is necessary, even though we agree with the intent of what the legislation was trying to do.

Ms. BACHMANN. That goes to my second question. I wonder if you could comment on the current legislation that is before the committee now, what you believe that process should be.

The other thing I wondered is just on a pragmatic/practical point of view, do you feel that has been the best valve of information for you, the Director of National Intelligence? Do you feel that you have gotten everything that you need to have in order for CFIUS to make its best decision?

The other question would be commenting on the current legislation before you. This is the best time to have input in the process. I think this committee would benefit from hearing what you have to say.

Mr. LOWERY. In terms of whether the intelligence community is the best valve, the answer is yes. Because the intelligence commu-

nity has fingers in lots of different areas, they can give us great information on the country and the company that are involved in these transactions, and they can tell us about the threats of that transaction.

They do not do figuring out the vulnerabilities of the assets that are being acquired. That is where the other agencies get involved, to the Congressman's question earlier, the expertise at Defense or Homeland Security, and that is why these agencies farm it out all over the place in their agencies, because they have expertise all over.

In terms of the legislation, we thought that the legislation did a good job of formalizing the role of the DNI. We think the two areas that probably the legislation could be improved on, and I think we can work with the committee on this, is first it was the point I mentioned about the 30-day requirement.

We do not think you need to have a minimum of 30 days because basically you can actually countermand the rest of the legislation about setting the process up.

The second area is there is a small provision in there about where after the committee has acted, if the intelligence community, and I am not going to get the words wrong, basically thinks it should be sent into a second stage investigation, then it should do that.

The only worry we have is that we have now moved the intelligence community from information and input into a policy level role. We would be a little concerned about that part.

Other than that, we thought the legislation was very good on this.

Ms. BACHMANN. Mr. Chairman and Mr. Secretary, I am wondering if you could elaborate on your final point on moving the DNI, the Director of National Intelligence, from strictly information to policy.

Could you make a recommendation to this committee so that the legislation—the premise of my question is this. I am just concerned that we are not creating additional bureaucracy so that we feel good about ourselves. I want to make sure that what we are doing actively is going to have a positive impact on national security.

The American public are jittery after what happened with Dubai. We just want to make sure that we are doing our part, but that we are not overreacting, and we are not creating something that will actually end up having an inverse reaction on America's security.

Mr. LOWERY. I think the best thing for me to do is to get you some language changes which we think—we agree with everything you just said. I think the best thing for us to do is get you some language changes so I do not put my foot in it here.

The CHAIRMAN. As a practical matter, I do not think anyone thinks that if the DNI were to tell you that this needs more information, that anybody would ignore that in this context. You might as well formalize that in some way.

We all agree, as a practical matter, that if the Director of National Intelligence says, "I am worried about this, you have to look at it again", nobody is going to ignore that.

Mr. LOWERY. Agreed.

The CHAIRMAN. Next we have the gentleman from Florida, Mr. Mahoney.

Mr. MAHONEY. I have no questions.

The CHAIRMAN. The gentleman from Georgia, Mr. Marshall.

Mr. MARSHALL. Thank you, Mr. Chairman.

Have you had an opportunity to look at the written testimony submitted by Mr. Heyman with CSIS and Michael O'Hanlon with Brookings?

Mr. LOWERY. No, I have not. I'm sorry, sir.

Mr. MARSHALL. There is an interesting tension that commonly exists here between the interests of the market and business community, etc., and the interests of those who are concerned about security.

In 1988, 1990, and 1999, a couple of Chinese colonels, senior colonels, wrote a book called "Unrestricted Warfare." That book was obtained by us and translated. It is really an interesting read. It is tedious. It is too long. In sum, it covers a wide range of possible ways in which China, specifically, could go about hurting the United States, essentially bankrupting the United States.

I know I am picking on China at the moment, but this would apply to any country or any non-nation state entity interested in harming us.

The ways in which that can occur, and I know you all have thought about this, goes so far beyond what we thought about 20 years ago. It is rather remarkable.

I am wondering in light of the fact that we now are quite concerned about these non-nation state threats, what kind of adjustments has CFIUS made to its process, to its standards?

I am not so much interested in the specific process that has been suggested by this particular bill; it seems reasonable to me. We could modify it. I am more interested in a broad brush, where are we now with regard to this on the one hand, and we do not want to undermine our economy.

That steps right into one of the things that these Chinese colonels recommended—to attack the underlying economy of the United States.

On the other hand, we do not want to make it easy for these non-nation state actors to hit the United States in ways in which we will be forced to take action that closes our borders and damages our economy and the world economy.

Mr. LOWERY. First of all, I am a Treasury official. Sometimes everybody thinks that all I care about is open investment. There is nothing further from the truth as far as I am concerned.

What CFIUS has tried to do is basically improve its processes, but improve its substance over the last few years, frankly, a decade. With 9/11 came a different way of thinking about the world.

Part of that is an answer that the Administration and Congress worked on, which is creating the Department of Homeland Security. The Department of Homeland Security was never part of, there was no department, it was not part of CFIUS. It is now a major part of CFIUS.

When every transaction is looked at, the intelligence and national security experts from our Coast Guard, Navy, Army, and Air Force, plus all of the experts within the civilian branches of the De-

fense Department and Homeland Security, as well as people at the Justice Department, and the FBI, are taking very careful looks at these transactions.

The Commerce Department—when CFIUS started, it was mainly about the commerce export controls and in the Defense Department, defense production. It is now much more about defense, but also critical infrastructure issues, telecommunications, which has become much more globalized than it was 10 years ago, and we look at those transactions very carefully and we have the right types of expertise.

Some of the processes that are in the legislation and that we have been pushing are about making a more certain process so that we still take national security as our foremost concern, but at the same time, making it so it is not onerous on the business community.

Mr. MARSHALL. I want to move away from the process here and just look at the substance of how we make our decisions.

When CFIUS was first founded, and in its early years, a decade or so, the concern was losing control over natural resources that were critically important to our economy and to our defense, etc., and technologies. Those were the two principal focuses.

Has that changed? One of the arguments, and apparently there is a little bit of a difference of opinion between O'Hanlon and Heyman, on whether or not ownership makes a difference.

Heyman takes the position that ownership does not make a difference, period, end of discussion. Dubai Ports World was an absolute debacle, because it missed the appropriate focus.

Are ownership concerns greater now?

Mr. LOWERY. I think that we do look at the ownership, and that is a concern. CFIUS came out of a variety of different reasons. It came out in the late 1980's because the Japanese were investing in a lot of transactions. The Japanese are not much of a major concern to the United States these days. We obviously are good friends and good colleagues with the Japanese.

I have not read their testimony, so I cannot comment on that. I can comment on this. If we, in the United States, base our security on who owns and operates ports, then we are making a mistake. We do it instead on our Customs, our Coast Guard, and our Port Authorities. They are the ones that are securing the ports.

That is what we should be doing. Those are the right officials to ask. I think they are doing a pretty good job.

We cannot do it based on how somebody invests their money and which country they come from, because by doing that, I think that we would drive investors away. We have to be very careful.

Ownership matters, and that is what CFIUS looks at, in the end, there is probably a balance between the two, but I have not read their testimonies.

The CHAIRMAN. I certainly hope the Japanese will not be discouraged from coming back as in the 1980's and substantially overpaying us for trophy properties. We would offer them the chance once again to do that. I think we benefitted greatly from that.

Mr. LOWERY. I agree.

The CHAIRMAN. The gentleman from Delaware.

Mr. CASTLE. Thank you, Mr. Chairman.

You made the suggestion, I think, Mr. Chairman, that it would be helpful if the Secretary sent us a summary of the process and how they review these transactions, with which I agree.

I am also very interested in your views on the expertise of the various people at the table: I have a rough idea of who they are, but I think it would be helpful to know exactly what they each bring to the table.

The one area or question I had was whether or not there is a definition of "national security" or if that is just formed by different decisions which have been made.

It seems to me you could make the argument that almost any ongoing establishment, be it a business or a publicly owned circumstance, such as perhaps sports or whatever, in the United States, has some sort of national security.

I think the gentleman from Illinois, Mr. Roskam, raised the issue about food, for example. I think General Foods is a possible transaction that may take place at some point.

Would this be part of national security? How does one know that? How does a foreign entity trying to buy something in America make that definition? I realize it is a bit of a guess and it is on a voluntary basis.

My question is what would they look to for that, and what should we think about in terms of what you believe "national security" is?

Mr. LOWERY. It is a very tough question and it does pop up a lot. It is hard for me to define "national security." In the Executive Branch, we obviously have to start with the President defining "national security" for us.

There is a reason why "national security" has never really been well-defined through legislation for a long period of time, and that is because it is an evolving concept.

I think, probably, if you looked at September 10, 2001, and September 12, 2001, there are different definitions of what "national security" would actually mean.

I think that what we are trying to do is define it as well as we can in that context, and avoid doing, I think, what your question I think is, which is creating a national screening process so that every foreign transaction has to be looked at. We just need to look at the ones that definitely rise to national security.

I think most people think of national security and they think of defense. Obviously, there are critical infrastructure issues that can arise, and there are some telecommunications issues, as well.

I think as case law—those are the wrong words because I am not a lawyer—as case precedents go on, I think the investment community gets a better understanding, and that is why legislation is helpful because it provides even more clarity to that community.

In terms of what you asked about the expertise that people have—the main thing we try to do is to bring in experts from around our government who can have 10, 20, or 30 years of experience on national security type issues.

We do that at the career level and then at the political level. My direct boss is a war hero, and he has been doing national security issues for the U.S. Government for 20 or 30 years, I guess. That is Deputy Secretary Kimmitt.



We bring very good expertise to the table. It does not mean we always get it completely right, but I think from a national security perspective, it is hard for me to think of a case where we have ever gotten it wrong.

Mr. CASTLE. That is good to hear. To me, it is sort of indefinite. It seems to me that a lawyer worth his salt at all could make the argument that virtually anything is national security in this day and age, which may not be correct, or which may be, in some cases, correct.

I think you do need to keep an eye on that in the balance, and I appreciate your answers. I yield back, Mr. Chairman.

The CHAIRMAN. An important point I would say again *de facto*, that is the case. If you are a foreign entity with money to invest, legally challenging the designation of "national security" is probably not a very promising thing.

If the U.S. Government were to invoke national security, I think the likelihood that you would go to court and have that overturned and buy the property anyway is nil. *De facto*. I think "national security" is whatever the people in charge say it is, and that would have the effect of canceling this particular transaction, which may be reassuring to people in that sense.

Again, it is an unwinnable lawsuit, I would think, especially since the government would then announce, as they often do when they have a weak case, that it is a big secret and they cannot tell the judge, and then the case has to be thrown out.

We next have the gentleman from New York who has joined us.

Mr. CROWLEY. I thank the chairman and I appreciate you allowing me to participate in today's hearing. I know, Mr. Chairman, you made reference to me "slumming" here at the committee today. I would never use that terminology, "slumming here."

The CHAIRMAN. The slummer rarely does.

Mr. CROWLEY. I'm moving back to the old neighborhood is what I am doing here. It is great to be back here with the chairman. Thank you for once again showing your leadership, and your commitment to this process.

I think it is important to point out for historical purposes that last year, just about 90 days after what I call the debacle of the Dubai Ports' deal, this committee acted unanimously to support the same legislation we have before us today, as well as the House of Representatives supporting unanimously in both the committee and on the Floor, unanimously and in a bipartisan way this legislation to deal with what seemed at the time as the ceiling falling in on us.

I think it showed how Congress can, even in an election year, work together in a bipartisan way when we understand the importance and the impact of our actions here in the House.

I said back then and I say again today—no bill was better than passing the Senate bill. I think that we were working in a much better way and a more productive way of producing legislation that I think would have both the impact of creating better nets of security and at the same time keeping open the doors for foreign investment here in the States.

Mr. Lowery, let me just ask you if you can give us your reason as to why you think there was such a dramatic increase in filings

and withdrawals, investigations, and mitigation agreements last year?

For example and specifically, DHS required more mitigation agreements last year than they did within the previous 3 years.

Do you believe there was a dramatic increase in deals that raised national security issues last year, or was it just that the bureaucracy was just going into a hyper cautious mode?

Mr. LOWERY. I am trying to come up with the right answer. I think the reason why we have seen an increase in filings, and I kind of went through it before, but basically it is that a strong economy leads to more investment, which means it leads to a stronger economy.

Secondly, there is no question the Dubai Ports World brought a lot of stature—that is not the right word—a lot of—

Mr. CROWLEY. Notoriety?

Mr. LOWERY. Notoriety to the process. That probably led to more filings. Some were defensive.

I think, in terms of the mitigation agreements, that Homeland Security takes its role very seriously. It goes to Congressman Marshall's points earlier. There has been an increase last year over the last few years, although if you go back and look, since Homeland Security came onto the committee, you have seen this steady increase. I think part of that goes to a lot of what has been discussed today, which is the flexible nature and broader nature of national security issues.

It has gotten into areas that CFIUS really was not covering in the 1990's all that much. With Homeland Security there, I think what they see is risks that maybe others had not been able to see in the past, so they want to make sure they mitigate those risks and do it in a way that best protects the homeland.

Probably part of that is a little bit of bureaucratic reflex, but I think a lot of that is just kind of the way and nature of national security in our country.

Mr. CROWLEY. Mr. Lowery, what is the cost of deals that do not implicate national security but end up going through the entire CFIUS process, and can we end up having too many deals in the barrel, in the pipeline, that will be distracting to CFIUS and distracting CFIUS away from those deals that need the maximum amount of attention?

Mr. LOWERY. Yes. That is why you will see some of our issues to address in the bill to try to get at those issues, so we can make sure, especially my Secretary and Deputy Secretary, are most focused on issues that are of most concern and not just focused on every single transaction.

It is something we have to be careful about. I think as we get more clarity in the process through legislation, through the Executive Branch doing its thing, we will see that level out.

If you go back and look at CFIUS when it was first created in 1988 in terms of looking at transactions, there was a huge number of transactions every single year. I was not around, obviously. My guess is some of them were nonsense.

Then you see this big tailing off during the 1990's and early 2000, and you saw a big giant increase last year, and I think that is revolving around certainty.

I think as we get certainty, there is probably an increase over what used to be the case, but it will probably plateau out.

Mr. CROWLEY. Thank you. Thank you, Mr. Chairman. I thank the gentlelady from New York for her leadership.

The CHAIRMAN. The Chair is now pleased to recognize the gentleman from North Carolina to say whatever he wants for 5 minutes.

Mr. MCHENRY. Thank you, Mr. Chairman. I am sorry to hear that you are under the weather today. It would be very unfortunate if you lost your voice.

The CHAIRMAN. I will not lose my gavel.

Mr. MCHENRY. Nor your wit.

Thank you for testifying. I am going to ask probably the same questions you have been asked 18 times, maybe 20.

Let's go through the basic process here, just so we have a good understanding. The Committee on Foreign Investment, who is a member of the committee?

Mr. LOWERY. The committee is made up of 12 agencies. There are six departments: The chair is the Treasury Department, and the others consist of the Justice Department, the Homeland Security Department, the Defense Department, the Commerce Department, and the State Department. Then there are six White House agencies: the National Security Council, the National Economic Council, the Council on Economic Advisors, the Office of Management and Budget, the Office of Science and Technology Policy, and the U.S. Trade Representative.

Mr. MCHENRY. They all sit on the committee?

Mr. LOWERY. That is correct.

Mr. MCHENRY. Are they just designated by the agencies or is someone appointed by the President for that purpose?

Mr. LOWERY. Each particular agency assigns somebody to look at the case. A case comes in. What Treasury does is basically takes the case and just farms it out and tries to flag any specific issues that we see.

Every now and then, there might be an energy issue, so we would invite the Department of Energy in. Then the intelligence community sits off to the side as sort of an input valve into this whole thing.

Each department basically has sort of a lead CFIUS office that is responsible for making sure they come to the meetings, for farming it out within their departments because there is different expertise from each department, and then presenting the views that are provided.

As cases rise up and get closer to the assistant secretary level, and then finally, every now and then, the deputy secretary level and then obviously, the most sensitive cases go to the Cabinet.

Mr. MCHENRY. Roughly a dozen cases a month, let's say.

Mr. LOWERY. That is about right.

Mr. MCHENRY. How many of these are actually seen by Cabinet level officials for sign off?

Mr. LOWERY. For sign off. I can speak for Treasury most easily, obviously. Every single transaction is seen by the Secretary or Deputy Secretary of Treasury on an information basis. On a closing out

the transactions cases, that is done by a Senate confirmed official, which can be an assistant secretary or an undersecretary.

Mr. MCHENRY. Since Treasury chairs CFIUS, I would like the answer for all the other agencies as well.

Mr. LOWERY. To my knowledge, each of the—I can speak easier for the departments than I can for the White House agencies, but the departments, to my knowledge, are briefing up to the highest levels on each case. Transactions are usually being cleared at Senate confirmed levels.

We usually get an e-mail that says the Department of Homeland Security has cleared off on this transaction. That comes through a staff level contact, but that person has cleared it within their own building.

In fact, we were sending out a weekly, within our building, and recently, we have started sending it out to other agencies, just to try to help.

The Department of Defense and the Department of Justice got mad at us because they are like, look, we are briefing our deputy attorney general or the undersecretary or the Cabinet, and you are confusing them, because our briefings will say something slightly different than theirs.

I know basically all the senior level officials are being briefed on each case.

Mr. MCHENRY. I would hope so, especially after the publicity of really a boneheaded and ill-conceived process with the Dubai Ports, which I think burned a lot of people.

It appeared to me that the process was handled at a staff level, with a number of e-mails being exchanged for sign-off, and there was actually no serious look at these roughly 100-some cases that flow through.

What you have is staffers handling this process and then the President gets blamed. It seems also with 12 agencies being involved that no one is in charge, even though Treasury is supposed to chair this.

Perhaps we have too many people sitting on this committee, and there is no responsibility falling on anyone.

Mr. LOWERY. We have said that we agreed that in Dubai Ports, agencies did not brief up well enough. Secretaries and deputy secretaries were not aware of these transactions or this transaction. That was a flaw on our part and we have corrected that.

In terms of accountability, a number of us have testified over the last year many, many times on Dubai Ports, on CFIUS reform, and on other cases, so I think in terms of accountability, we are actually on top of this.

We actually have our Senate-confirmed people looking at every single transaction, plus we have expertise within the Civil Service Branch, which in many respects are our real experts who are looking very carefully at transactions. Sometimes it is hundreds of people that look at a transaction.

I think that is what the American people would want, which is to make sure that people who have real national security credentials are very much looking at these transactions.

Mr. MCHENRY. Thank you, Mr. Chairman. In closing, I think it is important that we have a fair and open process, that we allow

for foreign investment but we do not overburden the Administration with too many filings, and that we have an efficient process for the private sector to get the answers quickly and efficiently.

Mr. LOWERY. Thank you. We agree.

The CHAIRMAN. The gentleman from California.

Mr. SHERMAN. I know in the Federal Government, you cannot really lose your job for stupidity, but did anyone lose their job as a result of the mistaken initial approval of the Dubai Ports' deal?

Mr. LOWERY. Not to my knowledge.

Mr. SHERMAN. I could only guess how big a mistake somebody would have to make.

Mr. LOWERY. Sir, the mistakes are—there were two mistakes.

Mr. SHERMAN. Reclaiming my time. I think the American people are really clear that you made enormous mistakes.

Mr. LOWERY. I did not say that we did not.

Mr. SHERMAN. I think the American people are really aware that incredible stupidity cannot get you to lose your job in the Federal Government, although sometimes it has that effect in elected service.

Rube Goldberg used to do these great cartoons and he stopped publishing them. I thought that he had passed on. Apparently, the rumors of his death were exaggerated. He seems to have designed the current CFIUS system, as the gentleman from Florida pointed out.

You have what, six agencies plus another six agencies, and you have testified with pride that sometimes hundreds of people look at a single transaction.

I would venture to say that where hundreds of people are responsible, no one is responsible.

I would like to shift to another issue. Last March, we had hearings at the subcommittee, and Mr. Manzullo pointed out that in the Dubai Ports' transaction, the Administration had simply ignored the law.

I just got out of Foreign Affairs where it is apparent that the Administration simply ignores the Iran-Libya Sanctions Act, simply refuses.

Is it the policy of this Administration to simply ignore laws that major economic interests feel are inconvenient? I will ask you to respond to that for the record. That was more of a rhetorical question.

Mr. LOWERY. No.

Mr. SHERMAN. I would venture to say that the handling of Dubai Ports, the handling of the Iran-Libya Sanctions Act, now the Iran Sanctions Act, demonstrate convincingly to the contrary.

Deciding whether we are going to allow foreign direct investment, particularly in the areas critical to our national security, I believe this investment is a privilege of the investor. You do not have a right to own American ports.

Do we consider whether the entity involved is following the boycott against Israel and announced by several Arab states? Is that a factor?

Mr. LOWERY. We look at many factors. That could be a factor in specific transactions.

Mr. SHERMAN. If it is not on the checklist, is it just a capricious decision by one of the people involved, or is it identified as a factor that is looked at?

Mr. LOWERY. What we do is the agencies with expertise, including in this case the State Department, is part of the CFIUS process and can weigh in.

Mr. SHERMAN. As far as you know, there is not a single one of these thousands of transactions where that has ever been officially raised by State or any other agency. Had it been raised, had it been on the checklist for Dubai Ports, you would have saved yourself a lot of problems.

Mr. LOWERY. That would have been a dispositive factor, if that is what you are suggesting.

Mr. SHERMAN. Not when you really look at their actions; no. You need to perhaps check with State as to what the Emirates actually does.

I will yield back.

The CHAIRMAN. The gentleman from Kentucky.

Mr. DAVIS OF KENTUCKY. Thank you, Mr. Chairman.

The whole issue with Dubai Ports, I think, brings up some interesting questions. I think oftentimes, the governmental process and even the legislative process has been known to overreact or create more rules, to treat the symptom rather than the root cause.

To your point on foreign investment, I think a proactive partner of foreign investment is very valuable in the creation of jobs and the perpetuating of our economy, particularly our export market.

My district hosts the headquarters, the North American headquarters, of Toyota, which has been a tremendous benefit to the midwestern United States, certainly to Kentucky.

They put their plant in shortly before the original CFIUS legislation came into being.

One of the questions I would like to ask, because I think there can be an overreaction to have a narrow group of say deputy secretaries or secretaries to provide final review, they are ultimately going to be dependent on staff, but there is a bigger issue that I see in play in the Federal Government, particularly related to national security.

That is, the interagency process is fundamentally broken. We have agencies, six agencies, multiplying staff, dead ends in communication, political agendas, surprisingly might intrude upon the decisions to efficiently process information.

I am wondering if you might comment first on a need for, let's say, rejuvenation by statutory change to allow a more network-centric process to assess these needs.

Dubai Ports, you know, showed this symptom. There were plenty of reasons to raise the question of no communication with Congress. I think a lot of that has been remedied.

At the root of it, I wonder if we can do something in the issue of assessing trade in the interagency process along the lines of what we have done with the National Counterterrorism Center.

We took agencies that did not communicate with each other, put them all at the table working together professionally incenting them, and have had a dramatic improvement in information security on that side.

Would you comment on that from your seat there at Treasury?

Mr. LOWERY. I think what we try to do to build up good inter-agency communications is one, we have established this year just having frankly a weekly meeting where we discuss the cases that are before us, and then as cases rise up in the concern level, then frankly, those weekly meetings become frankly slightly more often, and also might get up to the highest levels of our government in terms of conference calls or what have you.

We are trying to basically build the network by using what is available to us, which is bringing the agencies together.

Congressman Sherman, I know, was complaining about hundreds of people looking at transactions. It is because you are trying to farm it out to the right experts.

Mr. DAVIS OF KENTUCKY. I would like to reclaim my time. He was a CPA. I came from the manufacturing process world. We encounter professionally both sides of the same thing.

I think having a lot of people look at it does not necessarily make it a more effective process.

Coming back to the issue, I go back to the NCTC example. They actually shrunk down dramatically the number of folks who looked at it and had less inventory in the process, if you will, 12 transactions a month is pretty minimal.

They actually improved their productivity and were able to more quickly identify potential threats and deal with them.

Mr. LOWERY. I agree with the point that just having more people look at it does not mean anything. I think having people come together as representing an agency, which has different types of expertise within that agency, and providing a view of that agency, so that somebody from a Homeland Security department provides a view that this is Homeland Security's view on this specific transaction.

The Treasury Department as chair is making sure they capture the different views that are out there.

That is the type of process we have. I think we are open to other suggestions as to improvements on that process.

I think that what we have tried to do is it sounds like semi-close to what you are doing on NCTC. I do not know the issue that well.

We are bringing people together on a basis where they actually have to speak for their agencies as opposed to speak for specific parts of their agencies, which does lead to lots of confusion.

Mr. DAVIS OF KENTUCKY. The one concern that I have is that the people representing the agencies may be defending their agencies' interest, particularly watching in an election year last year. I think I have certainly seen this from a political perspective myself.

One of the things that occurred was all of a sudden there were no more problems relating to CFIUS issues until after the election. Certain agencies can certainly slow the process down to assure there is not only risk but also a political situation can be over studied and mitigated at risk to legitimate investment for the Nation.

I come back to the issue. I would like to correspond with you and suggest you talk to the Deputy Secretary about this. I have great personal respect for him. We have discussed the interagency issue a number of times, and perhaps adapt some form of that model to simplify the information process that addresses a legitimate secu-

rity concern that many of us were aware of that apparently never got vetted in that process.

At the same time, allow the proper oversight from Congress and also protecting our national security interests.

I yield back my time.

The CHAIRMAN. The gentleman from Texas.

Mr. GREEN. Thank you, Mr. Chairman. Thank you, Mr. Assistant Secretary, for appearing today.

Sir, the protocol having been established, please allow me to go right to a question. I am looking at section three of the bill. Section three, as I understand it, is being opposed by the Administration.

Section three provides for the vice chairs of the committee to be the secretaries of Homeland Security, as well as Commerce. There is also a provision for executive office members.

Can you explain why the Administration would be opposed to this, if indeed this is the circumstance?

Mr. LOWERY. I think the Administration just views that it is better to have flexibility than to put that into the statute.

In terms of White House agencies, obviously, the Executive Office of the President should be run by the President's Office. In terms of the specifics of who should be the vice chair and who should be the chair, we just think that is something that the Executive Branch can work out, although obviously we respect very much the advice of Congress on those issues.

I think that is our major issue.

Mr. GREEN. While this may not be of paramount importance now, I am sure you agree that we live in a world where it is not enough for things to be right; they must also look right.

The perception that the public has with this Dubai deal is that things just did not look right. They may have been right, but there was the appearance of something less than a perfect circumstance emerging from that transaction.

How would you have us, without having some sort of opportunity prior to transactions, how would you have us maintain the public's trust and respect if we do not go to the extent that we are trying to with this legislation?

Mr. LOWERY. That is a terrific question. The chairman made fun of me earlier for kind of talking about getting our confidence back.

Mr. GREEN. Do not feel badly about that. The chairman makes fun of me all the time.

Mr. LOWERY. That is what we are trying to do. First of all, let me just state that the legislation, we thought, was very good. There are some parts of it we would like to change, not surprisingly.

We think that having that type of legislation will help build confidence with Congress that we are trying to do the right things. We are not sure it will help that this group or that group is the chair or vice chair, as long as Congress understands what the Executive Branch is doing in terms of how it is doing its work, and that is the only thing.

We agree completely that we need to build your confidence up more so that you can help us make sure that the American people's confidence is built up.

Mr. GREEN. Thank you, Mr. Chairman. I yield back the balance of my time.



The CHAIRMAN. I appreciate it. I would just say to the gentleman, so he does not think I do not always respect his opinion, in regard to the first question he asked, I do not think the Administration's objections are going to carry an enormous amount of weight in this situation, so I think the provision the gentleman talked about is likely to remain in the bill.

The gentleman from New Jersey.

Mr. GARRETT. Thank you, Mr. Chairman.

Before I begin, just taking off the page of the gentleman from Texas' comment, I think you hit it on the nose as far as that perception is reality in these situations. Sometimes that is good and sometimes it can have the obvious difficulties that we have here.

I come from the great State of New Jersey, where we live in the shadow of the Twin Towers. The various ports that we have that my constituents work for, whether it is across the river in New York, or here in New Jersey, although none in my district, but a number of our folks certainly make their livelihood out of them, and the goods that are shipped through them, and come through those ports obviously impact upon our economy.

You can imagine the perception aspect of going back to the Dubai Ports' situation and how it would impact upon our district.

I should say that was before the Dubai situation, and after I have had the opportunity both in my current capacity as a Congressman to visit the ports, and to meet with the folks who run them, both before 9/11 and after.

I do just take this time to compliment the folks who are running these ports, both from a public perspective, the government officials, and also the private sector as well. Their heart and soul is on the same thing as the American public—the security of those ports.

Some of that, I think, was lost to their detriment in the light of everything that came out in the media. Some of them, I think, got a sense that we were looking at them and the way they were performing their job, whether in the public sector or the private sector, and that really should not have occurred after that.

That goes back to the comment that perception is reality.

Just two comments. I have been listening to your testimony, and with regard to the number of people involved, I think I would just want you to elaborate, as far as the farming-out aspect to say, and correct me if I am wrong, you are really delegating it.

We have 100 people here, but you are not saying you are going to have the 100 people here doing it, you are going to identify these 2, 6, or 12. Is that right, when you are making reference to hundreds of people?

Mr. LOWERY. Yes. I do not mean to cause confusion with that. Each agency has their own processes for trying to figure out a transaction. There are different experts within the agencies. What I mean by hundreds of people is that the Department of Defense, for instance, has 22 different agencies that look at these things. Not every one of them has expertise on a particular transaction.

It is the ones that have expertise that are the ones that are going to be most important, and they are going to be the ones that inform the Department of Defense leader on this issue.

The Department of Defense has to come with a view. That view is going to be briefed up within their department so that either the Secretary, Deputy Secretary, or Undersecretary of Defense is aware of the transaction, understands it, understands the concerns of his experts or not their concerns, and is able to give judgment.

That is how we do things. I do not want to confuse people with the hundreds of people. It is just that we have lots of different experts within our government, and we want to make sure they have a chance to look at something, although the final decisions are being made at a presidentially appointed Senate approved level.

Mr. GARRETT. My second question goes to, I guess, what I will call the burden of proof. I think the gentleman on the other side of the aisle made the comment, if I am not mistaken, that companies and individuals do not have necessarily the right to come in and control these companies.

In a court of law, obviously, you are presumed innocent until proven guilty in most instances, unless you are dealing with the I.R.S. You are innocent and the burden of proof is on the State or the government to prove it.

Is it appropriate to attach that analogy to this situation as well, if a company comes in or an individual and wants to purchase this, where actually in the whole process is the burden of proof?

In other words, is it on you and the government to say everything checks off, you are good, or is the burden of proof on them really to say well, we should be here because everything is appropriate? Where you have that burden of proof, I think, can affect potentially the outcome of these decisions.

Mr. LOWERY. That is a terrific question, but I am not sure how to answer it.

Mr. GARRETT. I hope the chairman notes that.

Mr. LOWERY. It is a terrific question because I think the burden of proof is on both. The burden of proof is on the Government of the United States because we have to show why there is a problem with this transaction.

Remember, we are welcoming a foreign investment. It says in the law that we have to be looking at national security concerns and whether there is a threat. That seems like our burden of proof.

On the other hand, we have to get the most up-to-date and honest trustworthy information from the companies themselves, so we ask a lot of questions. Sometimes these companies, and you will hear about this, do not like it.

At the same time, we are trying to get as much information as we possibly can so we can answer the questions that have come up from our experts about a specific transaction.

In many respects, the burden of proof is on both.

The CHAIRMAN. I am going to give the gentleman a bonus question for his "terrificness", and he may ask another question if he would like.

Mr. GARRETT. May I reserve that for another time?

The CHAIRMAN. No.

Mr. GARRETT. If I may just ask a follow-up question on that, since I cannot reserve that and carry that over, is that appropriate because they do not have the right to come in here, should not we be putting—this is what my constituents will ask me at my next

town hall—should we not be putting the burden on them to be forthcoming, not only forthcoming, because I know that is part of the process, should not the burden be extra on their side as opposed to on both or one side or the other?

Mr. LOWERY. To a degree, yes. I think frankly there is a burden on them. If you were investing and you were born in a foreign country and you were investing in the United States in an area that raised national security issues, you have a greater burden on you than a domestic firm.

The CHAIRMAN. As I said before, de facto. If you are a foreign investor thinking about putting your money here, if the U.S. Government opposes you, I do not care where the burden of proof is and what the likelihood is of you ultimately winning in court, that is the end of the deal.

You can likely use your money to go to court and fight that fight, and we know there is the possibility that there might be a Congressional hearing on the investment, we are told, and I think accurately, is enough to discourage it.

I think de facto the burden of proof is very much on the people who want to come here, and the very fact of a serious controversy will almost always put an end to the deal.

The gentleman from Texas. I should explain to the gentleman from New Jersey that it is not reservable because we are probably not going to be on the same side that often.

Mr. GARRETT. You never know.

Mr. HENSARLING. Thank you, Mr. Chairman.

I do think this is an important hearing, one that unfortunately I have missed much of due to appearing at a Budget Committee hearing. No matter how many terms I have served, I have yet to master being in three places at once.

The CHAIRMAN. You should have been here. This one is going to be real.

Mr. HENSARLING. Mr. Chairman, given that your party is in charge now, I will share that.

The concern I had as we approached this hearing was that this particular legislation, which may be good, it certainly has the goal of increased disclosure, and increased accountability, but since coming to Congress, I have seen very often where the cloak of national security is used to frankly hide a protectionist agenda.

The debate about trade has been around since the dawn of man, and I have particularly strong opinions on one side. I believe it is the right of an American if he wants to purchase a shirt produced in Costa Rico, that ought to be part of his economic liberties. Clearly, there are people strongly on the other side.

Having said that, like many issues we approach here, it is a question of balance. There are legitimate national security concerns. We may be plowing a little bit of old ground here.

The first question I have, coming from the perspective of Treasury, under current law is, is it possible to override the concerns of the Pentagon, and of the Department of Homeland Security? How do we know that their voices are receiving the concern they are due?

Mr. LOWERY. No, it is not possible. As the chair of CFIUS, my folks do a very good job on some very tough issues, but in many

respects, we serve largely as a secretariat function, to make sure that everybody is informed of every single transaction.

The Departments of Homeland Security, Defense, Justice, and other agencies are very vigorous in how they submit their reviews.

If there is a specific concern of the agencies on a transaction, the investigation will be extended. If that concern cannot be addressed at the end of the day and while other agencies, including Treasury, might have a different viewpoint, that could go to the President of the United States and only the President would make that decision.

Mr. HENSARLING. Right now, as part of this debate, there is a discussion as far as redefining the concept of "national security." How does Treasury feel about that? Forgive me. I missed your testimony.

Mr. LOWERY. That is quite all right. It is very difficult to define "national security" because it is an evolving process. It is an evolving concept, actually.

I think Congresswoman Maloney talked earlier about the idea of having broad and flexible definitions, and that is what we try to do.

As I said earlier, if you looked at national security and thought about it on September 10, 2001, and then on September 12, 2001, you would have come up with different definitions.

I think that is how we have tried to evolve. When CFIUS was created, it was mainly about defense production issues and export controls. We now look at a lot more types of transactions, some of them are in critical infrastructure, and some of them are in telecommunications.

It is an evolving concept and we are always being informed by people within the Executive Branch, but also people in Congress.

Mr. HENSARLING. Again, generally, I view direct foreign investment as tending to be a good thing. I believe that there are millions of American jobs that are dependant upon it, some of which are in my Congressional district. Those jobs tend to be at wage rates higher than the national median.

There is some discussion in this debate about making CFIUS submissions mandatory as opposed to voluntary. What is Treasury's position on that and what impact might that have on increased direct foreign investment?

Mr. LOWERY. We think that is a terrible idea. The reason we think it is a terrible idea is because if it was mandatory, there are probably anywhere between, I do not know, 700 and 1,100 transactions a year that happened in the United States from foreign acquisitions. They are very important to our growth. They are very important to job creation. They are very important to wealth creation.

CFIUS looks at roughly 10 to 20 percent, which is basically reflective of what types of transactions are happening in the national security field.

We want foreign investment to be open. We do not want to create a national screening process. If you move towards mandatory filings, you are moving much closer to a national screening process as opposed to a national security process.

The CHAIRMAN. We have kept you, but we have another panel. I just want to thank the Assistant Secretary. You have been very forthright and patient, and the Department should be well pleased with your presentation.

We have asked you for some further things which we think will be helpful, and you are now excused, and the next panel will please assemble quickly.

We now have our second panel. We will begin. My advice to the panel would be that you might want to particularly address some of those issues that you heard being discussed.

I think you have a generally favorable disposition on this committee. We passed this bill unanimously last year.

If I were a witness, I would try to address some of the particular points. Whether or not all of the members are here, the information will get to them.

We will begin with our former colleague, a former member of this committee from Texas, Mr. Bartlett, who is the president and CEO of The Financial Services Roundtable.

#### **STATEMENT OF STEVE BARTLETT, PRESIDENT AND CEO, THE FINANCIAL SERVICES ROUNDTABLE**

Mr. BARTLETT. Given the lateness of the hour, and the full and robust discussion by the previous panel and by the committee, I will submit my testimony for the record and offer just a couple of comments.

First, The Financial Services Roundtable and our members support H.R. 556, and we urge its early passage into law. Given that there are both national security interests and international relations' interests, we urge that it be brought up under either a suspension or some form of restricted rule to avoid amendments that could damage national security or international relations.

Second, we do urge two changes in the legislation as it is currently proposed. One is that there be no requirement of a mandatory review unless both it involves both a foreign government and a national security interest. We do not think it should be a simple test of either/or.

We urge you to disallow the so-called "evergreen" action by CFIUS, in which an approval of a purchase could occur and then after the ownership has been transferred and the money put in the bank, if you will, then CFIUS reopened the process. We think there are adequate national security laws to protect national security and reopening an ownership that has previously been approved would not be in the best interests of the United States of America.

In conclusion, we urge prompt passage of this legislation.

[The prepared statement of Mr. Bartlett can be found on page 74 of the appendix.]

Mrs. MALONEY. [presiding] I thank the gentleman for his testimony. Going right along to Todd Malan, president and CEO, Organization for International Investment.

**STATEMENT OF TODD M. MALAN, PRESIDENT AND CEO,  
ORGANIZATION FOR INTERNATIONAL INVESTMENT**

Mr. MALAN. Good morning. My name is Todd Malan and I am the president and CEO of the Organization for International Investment.

OFII is the organization that represents the largest group of foreign investors in the United States. We have 150 member companies who basically form the customer base of CFIUS. Therefore, I am very happy to be able to testify this morning.

We talked a little bit about the benefits of foreign direct investment this morning and I wanted to go over some of the facts and figures about that.

5.1 million Americans work for U.S. subsidiaries of foreign-based companies. Those companies pay on average about \$64,000 in wages per employee, which is 32 percent higher than all other jobs in the United States.

One fact that is sort of counter intuitive about these companies is they are not just here for this market. They are, in fact, exporting from the United States. About 19 percent of U.S. exports are created by foreign companies that have operations here in the United States.

Two other facts that I think are interesting for the committee to consider: 94 percent of total assets owned by foreign companies are from OECD member nations, other countries that have similar standards as the United States; and 98 percent of U.S. foreign direct investment is from private sector firms (and only 2 percent are from government-controlled companies).

There are a number of things beyond statistics, the story about in-sourcing in the United States is compelling. We have done a study that looks at every State and how they benefit from foreign direct investment (FDI). If you would like to look at your State and how it benefits from FDI, go to [ofii.org](http://ofii.org).

One thing I felt would be beneficial is for me to reflect some of my member companies' concerns about the current CFIUS process after the Dubai Ports World situation that we have talked so much about this morning.

I think it is important for members to think about it in a post-September 11th era; obviously, protecting national security is clearly the priority.

When functioning properly, CFIUS should act as a triage doctor would in an emergency room, quickly analyzing and approving non-sensitive transactions in which the buyer does not pose a threat or the target does not involve national vulnerability. This leaves the process able to focus on transactions where the national security risk is significant. In other words, it is just as important that CFIUS clear transactions that do not implicate national security as it is that they drill down deeply into those that do.

A recent study published by the National Foundation of American Policy showed that in the last year, the number of CFIUS filings has increased by 73 percent; the number of investigations jumped by 350 percent; and the number of companies withdrawing their filings from CFIUS grew by 250 percent. Also, there were more second stage investigations last year than during the previous

5 years of the entire Bush Administration, and more than in 1991 to 2000.

The number of mitigation agreements or conditions imposed on companies more than tripled in the year. More specifically, the Department of Homeland Security required an average of 4.5 mitigation agreements per year between 2003 and 2005. Last year, DHS required mitigation agreements in 15 transactions.

While unofficial data suggests there was growth in foreign investment in 2006, it is hard for me to imagine that in 2006, there was suddenly a much larger number of transactions that truly implicated national security. Rather, I suspect that CFIUS bureaucracy went into a hyper cautious mode. Caution is warranted in national security focus and cannot be compromised. However, we cannot let CFIUS get bogged down by transactions that do not have anything to do with an increased risk profile.

OFII is also concerned that some agencies are taking undue advantage of the leverage inherent in CFIUS. CFIUS should not be a fishing expedition for a single agency to address comprehensive industry objectives on a "catch is as catch can" basis, merely because they have leverage over one industry participant.

CFIUS should not be a way for the government to avoid open and deliberative processes of creating rules under normal rule-making procedures in which public comment and Congressional accountability are present.

For example, if the Department of Homeland Security perceives a vulnerability in our telecommunications infrastructure, it should address that vulnerability across the sector, without regard to the ownership of firms.

We all know that large chemical plants present a possible risk of attack. Would it make sense for security standards or government protections to only apply to a Dupont facility but not to BASF? Of course not.

We should not approach national security vulnerabilities in a piecemeal fashion.

Mr. Chairman, we are very happy to support the legislation that the committee is considering. We have made a few small suggestions in regard to that.

We look forward to working with you and the committee to advance that legislation.

[The prepared statement of Mr. Malan can be found on page 93 of the appendix.]

The CHAIRMAN. Thank you.

Mr. Michael O'Hanlon, senior fellow in the Foreign Policy Program, Brookings Institution.

**STATEMENT OF MICHAEL O'HANLON, SENIOR FELLOW,  
FOREIGN POLICY PROGRAM, BROOKINGS INSTITUTION**

Mr. O'HANLON. Thank you, Congressman. I will try to follow the example and be quick myself.

I think it is important that there is this consultation with Congress that is being enhanced. Let me just say one word about why and leave it at that for my remarks.

I think when you imagine the importance—we have not talked a lot about the substance of how you evaluate a proposed deal. We have talked a lot about process today.

Congressman Marshall mentioned the need for focus on substance. You have to do scenario analysis. You have to evaluate what could go wrong with this deal and think it through in some level of detail, and it is going to be an inherently judgmental and subjective process in some cases, which is why I think Congress' opinion is always going to be worthwhile.

I will just mention two very quick examples and be done. One was Dubai Ports World. The reason why I was skeptical of that deal at the time is because I took note of the fact that we did not allow citizens of the United Arab Emirates to come to the United States through the VISA waiver program at that time.

We felt that the UAE's processes for evaluating its own citizens' trustworthiness to come to the United States, like with most countries in the world, were not good enough that we could simply give a blank check or a blind eye to whoever would be coming to the United States, and yet we were prepared to let this same country or a company from this same country have access to learn potentially about some of the strategic vulnerabilities in what I would call sort of part of our strategic national underbelly, the ports of our Nation.

Scenario analysis led one to conclude there is a possibility that certain practices would become well known to citizens of the UAE and then they would realize what our strategic vulnerabilities were, therefore, I think it was appropriate that deal was scrutinized and in the end, opposed.

You and Congresswoman Maloney talked about the hypothetical of a hotel near the White House being in the hands of a foreign government. I think you have to do scenario analysis on that, because I think there is the possibility of a worry in that kind of a situation myself.

I have not thought through which one of you I agree with. I sensed a slight difference of opinion between the two of you.

You need to have that kind of scenario analysis to figure out whether a deal makes sense or not, and simply constructing a process does not guarantee that the right judgment will be reached once you do that analysis.

I want to commend Congress for the fact that this bill requires greater consultation. You are always going to need multiple smart people looking at the same deal and using their best judgment to know if it makes sense.

Thank you.

[The prepared statement of Mr. O'Hanlon can be found on page 163 of the appendix.]

The CHAIRMAN. Thank you. Thank you for your directness.

Mr. David Marchick, a partner with Covington and Burling.

#### **STATEMENT OF DAVID MARCHICK, PARTNER, COVINGTON AND BURLING**

Mr. MARCHICK. Thank you very much, Mr. Chairman. Thank you for the opportunity to be here. I will be very brief as well. I see that we are losing interest in this subject.



The first point I would like to make is that the CFIUS process has already changed.

The CHAIRMAN. It is not that people are losing interest. It is that they figure at this point, they may not be gaining knowledge.

Mr. MARCHICK. Hopefully, I can add a little to the debate.

The CFIUS process has changed and changed significantly. Todd went through the data. There was suddenly a huge increase in filings, withdrawals, investigations, and mitigation agreements in 2006.

Some of it, I think, is that the bureaucracy took the wrong signal about Dubai Ports. Whereas the concern about Dubai Ports was in large part about communication with Congress, I think the bureaucracy has taken that signal and said that we need to scrutinize every single transaction when, in fact, the important thing is to scrutinize those transactions that really raise national security issues.

The second point is that timing and certainty matter. The process and the political issues relating to Dubai Ports has created uncertainty in the marketplace. Uncertainty about when companies should file, uncertainty about how long the process should take, uncertainty about whether there will be a mitigation agreement, and with the Alcatel-Lucent transaction, uncertainty about whether a transaction will be reopened at some point in the future.

Uncertainty in the timing to close is very important. I will just give you a quick example. If I were selling my house and Mr. Malan was bidding against Mr. Nichols, and Mr. Malan and Mr. Nichols both bid the same amount, but Mr. Malan could close in 30 days, and Mr. Nichols could close in 90 days, and the bank put all kinds of conditions on Mr. Nichols' bid, and on top of that, there was the possibility that the transaction could be unwound 3 years, 5 years, or 10 years in the future, I am going to go with Mr. Malan any time. That same concept applies to transactions going through the CFIUS process.

The third issue is the bill. I really commend Ms. Maloney and the bipartisan team that put the bill together. It is a very good bill. I do recommend a few tweaks.

One tweak would be the DNI provision, which has been discussed at length. I will not talk about that again.

The second would be government ownership. There should be additional scrutiny of acquisitions by government-owned entities, but not all acquisitions by government-owned entities create a national security risk. The time for a review does not equal scrutiny or the level of scrutiny in a review.

Just to give you a simple example. Late last year, the Ontario Teachers Pension Fund bought four or five ports in the United States. Some of those ports were exactly right next door to the ports that were going to be purchased by Dubai.

It is hard to see how an acquisition by a bunch of Ontario teachers and their pension fund could raise national security issues. That transaction did not need to go through an investigation.

If the bill were in place last year, that would have taken 90 days, and that could have knocked their bid out and made it less competitive.

If you force all of these transactions into the process, even if there are no national security issues related to them, then you are going to divert CFIUS' attention from those transactions that matter. I would encourage a few adjustments there.

The final point is that on mitigation agreements, I would encourage some principle in the bill that mitigation agreements should only focus on the marginal increase in risk as a result of a transaction, as opposed to a general security issue that exists related to a particular sector, like the telecommunications sector.

Finally, mitigation agreements should only be put in place if other laws or regulations do not adequately protect national security.

The final point is that one never knows whether the bill, which is a very good bill, will become law. Last year, you passed this bill 434-0. The Senate had a different bill. The bills were not reconciled.

I would hope that with your blessing, the Executive Branch could put out an Executive Order that adopts some of the concepts in the bill, just in case the bill does not become law, so there is something in place as an insurance policy in case this bill is not reconciled with the Senate and the President does not sign it.

I think you have a very good bill. With a few tweaks, it will be a great bill. I really appreciate the opportunity to be here today.

[The prepared statement of Mr. Marchick can be found on page 104 of the appendix.]

The CHAIRMAN. Mr. Robert Nichols, president and chief operating officer of the Financial Services Forum.

#### **STATEMENT OF ROBERT S. NICHOLS, PRESIDENT AND COO, FINANCIAL SERVICES FORUM**

Mr. NICHOLS. Thank you, Mr. Chairman. Thank you, Congresswoman, for introducing H.R. 556, and for your leadership both in this and the previous Congress.

I am here representing the Financial Services Forum, which is an economic and public policy organization representing the CEOs of 21 of the largest financial services firms doing business in America.

Today we are talking about two goals, protecting national security and encouraging vital foreign investment. These goals, we believe, are harmonious.

The financial services industry is acutely aware of the serious threats faced by our Nation and the need for Congress to consider all aspects of national security in its decisionmaking.

Addressing threats to U.S. national security must be undertaken with absolute resolve and come second to no other priority.

We also strongly believe that protecting U.S. national security and advancing America's global economic leadership are compatible and reinforcing goals. Indeed, we cannot achieve one without pursuing the other.

In an increasingly interconnected world, the health and vitality of the U.S. economy, and therefore American jobs, depends on open markets and the free flow of capital.

U.S. investments abroad support economic growth at home, access to resources, and in turn, national security.

Similarly, foreign investment in the United States brings trillions of dollars of capital, new ideas, and techniques and methodologies, all of which promote U.S. economic growth and enhance our competitive position in the global marketplace, and help create millions of American jobs, as Todd discussed.

Unfortunately, in the wake of the Dubai Ports World controversy last year, securing approvals within the process of foreign investments, the CFIUS process of foreign investments, has become more difficult and is taking longer. That is not good news for the U.S. economy.

Limiting the pool of potential investors in buying of American assets undermines the value of those assets, harming business owners, their workers, the interest of shareholders, and Americans with money invested in stocks, mutual funds, and 401(k) retirement and pension funds.

With these concerns in mind, we respectfully urge Congress to reject unwise and unnecessary new restraints on open markets and the free flow of capital, as it considers reforms to the CFIUS process.

Any changes should result from a thoughtful, considerate, and fact-based assessment, and should seek to restore confidence, certainty, and predictability to the prospect of investing in America.

Certainty and predictability are fundamental ingredients to the success of our capital markets. Your important legislation will help restore that needed certainty.

Before I close, let me touch briefly on some brand new data regarding public support for foreign investment. When supplied with the facts, Americans clearly value the benefits of foreign investment, according to a survey we, at the Financial Services Forum, commissioned just 2 weeks ago.

We found that support for foreign investment has risen since the Dubai Ports' controversy. Now, 51 percent of Americans have a favorable view of foreign investment compared to 47 percent last April. Americans also have a more favorable view of foreign investment when they know the facts. Sixty-one percent have a more favorable view when they understand that foreign investment creates 5 million jobs compared to 52 percent in the previous survey. That number has grown.

Knowing that, 57 percent of Americans we surveyed are concerned about legislation that might stifle foreign investment.

Considering all of the rhetoric and debate surrounding foreign investment in the last 12 months, I think these figures suggest a pretty sophisticated American public when it comes to this issue.

Speaking of surveys, when we asked our 21 member CEO's to rank 10 potential threats to the continued expansion of the U.S. economy, in a survey the Forum conducted this past October, they ranked protectionism as the most serious threat to continued economic expansion over terrorism.

Mr. Chairman, as reform alternatives are further deliberated, we urge Congress to take a platform measured approach, and be mindful of the critical importance to America and to the world of thriving global trading relationships.

We cannot expect other countries to keep their doors open to U.S. investment if we close our doors to foreign investment here. Keep-

ing our country open for business is in the best interest of America, and to keep our doors open, we need to maintain predictability, as I said, and certainty, hallmarks of the U.S. capital markets.

Thank you very much for your time. Mr. Chairman, Secretary Evans sends his regards.

[The prepared statement of Mr. Nichols can be found on page 132 of the appendix.]

The CHAIRMAN. Mr. David Heyman, who is the director of the Homeland Security Program at the Center for Strategic and International Studies.

**STATEMENT OF DAVID HEYMAN, DIRECTOR, HOMELAND SECURITY PROGRAM, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES**

Mr. HEYMAN. Thank you, Mr. Chairman, Congresswoman Maloney, and Congressman Jones.

I was asked to present a context from a national security and global terrorism perspective for which members might consider reforms to the CFIUS legislation, and to do that, I would like to make three main points.

First, the security landscape has changed and we must understand the nuances of those changes to consider what should or should not change with regard to CFIUS.

Second, in particular, we must understand al-Qaeda's interest in undermining the U.S. economy and bin Laden's "lead to bankruptcy" strategy.

Third and finally, Dubai Ports. This was a transaction that finally put port security on the map, but from a national security perspective, it was in my mind a debacle. Nonetheless, the lesson should serve as a model for good and bad.

Let me start with the considerable changes in the security landscape since 9/11. In terms of who we fight, how we fight, where we fight, and who does the fighting, we have come to view national security in a brand new light today.

Let me elaborate on each of those briefly. First, our adversaries are no longer principally nation states but now include non-state actors or terrorists.

Second, the front lines of war are no longer predominately trenches across political boundaries. They are in the streets and buildings of our cities and States, at curbside check in's at airports, at turnstiles in stadiums, and in emergency rooms in hospitals.

Third, our battles are no longer fought solely by airmen, soldiers, sailors, and Marines. They are also fought by epidemiologists, fire fighters, citizens, and police.

Fourth, the weapons we wield to wage war are not just tanks, missiles, and rifles, but also satellites, computer algorithms, vaccines, sensors, and databases.

These changes raise a fundamental question about what constitutes national security concerns in the CFIUS national security review. This is the substance of the review.

In particular, would, for example, foreign ownership of critical infrastructure of vital services that sustain our lives pose a new risk to national security in light of global terrorism? Are we at risk of

handing terrorists the keys to securing our house by allowing foreign direct investment in critical infrastructure?

This was in the end the fear and frankly the underlying question during the debate of Dubai Ports.

We have to be careful here when we talk about risks, when we assess risks. There are components to it. There is a difference between a threat and a vulnerability. Threat has to do with the adversary's means and goals of the attack. Vulnerability is the target of attack and the protected means in place.

In Dubai Ports, Dubai Ports was not a threat but the ports were extremely vulnerable. There is a difference there. CFIUS will not fix that vulnerability, only new safeguards will.

The second point I want to make has to do with understanding that our economy is a target of a threat. Contrary to what most Americans believe, al-Qaeda's intent is not to destroy the United States through direct confrontation, through direct attacks, but rather to provoke America to destroy itself.

Bin Laden's own words, which I will not go into because it is in my testimony, refer to his experience in Afghanistan against the Soviets, and he talks about bleeding Russia over 10 years until it went bankrupt and was forced to withdraw.

This is a model that he seeks to replicate with America. Yes, we must continue to protect against future attacks, no question, but we must also have an eye on the economy and avoid self-inflicted wounds, which brings us to Dubai Ports.

Dubai Ports was a self-inflicted wound. In effect, we denied direct foreign investment to the United States by an UAE firm because of an unfounded fear of an unsubstantiated terrorist threat. Worse, we had a unique opportunity to improve national security and we lost it.

By squashing the deal, what we got, and what we have today, is worse port security than it would have been had the deal gone through. I can elaborate in the questions.

Four lessons of Dubai Ports and how the CFIUS process worked. Number one, foreign ownership does not and should not be assumed to automatically infer additional vulnerability on a business.

Number two, a firm from a country where there has been known sources of terrorism should not automatically disqualify it from investing in the United States.

Number three, the threshold tests for the CFIUS national security reviews should be based on two assurances. One, that security of business transactions meet U.S. standards, and two, that the U.S. Government has the ability and authority to audit and verify that security.

The last point, the CFIUS process must remain confidential, but it must also become much more transparent to key Members of Congress who are responsible for oversight.

I would like to revise and extend my comments.

[The prepared statement of Mr. Heyman can be found on page 83 of the appendix.]

The CHAIRMAN. Thank you. Thank you all for the brevity. As you know, we now have about 18 or 20 minutes to get over there to vote. I think we can do the questions now.

Mr. Nichols, one suggestion. I know all organizations do this. People spend money on polls and they come tell Members of Congress what the polls say. Members of Congress take their own polls. I do not know a single Member of Congress who cares what a national poll says; what we care about is what they say in our districts.

The fact that you went from 47 to 51 percent, which may or may not be within a margin of error, is not going to buy us much. I hope you guys are doing other things to help us get the votes. I know you are.

Secondly, to Mr. Heyman, I cannot resist, if you are going to pick a fight, you have to be careful. On page one, look at the third paragraph of your testimony, in which you say, "So with all do respect to the members of the committee, it's the economy, stupid." That would have had more force if you had not misspelled "due." When you misspell a three letter word, do not call people stupid. I think that is probably a good lesson for the future.

With that, I will recognize the gentleman from North Carolina.

Mr. JONES. Mr. Chairman, thank you very much. I am sorry I could not be here for the testimony of the witnesses before Mr. Nichols, I believe.

My interest, and I want to thank the chairman for holding this hearing, is I realize that we live, as you said, and you said in your testimonies, we live in a global world, a global economy.

When you come from a State like I do, North Carolina, where even as late as last week, hundreds of manufacturing jobs are going overseas, and I think Mr. Nichols, as the chairman made reference to, polling numbers.

You might hear those polling numbers from the country club, but you are not hearing those numbers from the average working man or woman.

When I look at the fact that prior to NAFTA, we did not have a trade deficit with Mexico, but since NAFTA, now the trade deficit is somewhere around \$60 million.

I know in this world we live in, there are people who have money and people who do not have money. At the level of many of those who support you and others, and I am not being critical, I wish I was there, but what I see, and I have been in Congress for 12 years, going on 13 years, and what I see happening every day is the rich and the have not's and the have not's have been working for 20 and 30 years of their life, the have not's are having less.

What do you say to a Congressman who has had hundreds of jobs, not only from the State, but from his district, go overseas, and then as Mr. Frank said, it is God's will, the people's will, I can live with it.

When I see what is happening to this great Nation because what I think the word is, is not from you gentlemen, I want to make that clear, "greed" is destroying this country. I know I have not asked a specific question, but I have put some thoughts out, maybe not worthwhile, but I put some thoughts out.

I would like to hear you respond to my thoughts.

Mr. NICHOLS. I take many of your points and I share many of them as well. One subject that I know the chairman will have other hearings about and that we have discussed participating in

is talking about some of those who have been dislocated by globalization, talking about those who are not feeling the full benefits, and those who are not left behind.

There are a lot of things that both the public and private sector need to do to help those people, your constituents and in other pockets of our country.

While I am a passionate supporter of trade and the benefit it brings to the global economy, you make very, very thoughtful points that we will be exploring under the chairman's direction.

The CHAIRMAN. If the gentleman would yield, I take it, and I share much of what the gentleman said, but when we are talking about foreign direct investment, we are talking about the flip side of that. That is, we are talking about money invested here, not in financial instruments, but in real things, so that the impact is job creating here as opposed to whatever you people might think in other places.

Mr. MALAN. I would just add to that. The flip side of the coin is exactly right. North Carolina, more than any other State, really is out there trying to attract more of my member companies to come into the State and operate in the State.

198,000 people in the State work for U.S. subsidiaries of foreign-based companies. You have GlaxoSmithKline. You have companies like Kidde Aerospace, which just opened a new plant in the State—700 new jobs and a \$40 million investment.

That, to me, is this aspect of the global economy that your constituents can look at—bricks and mortar—and say ah, new plant, came in from the U.K., new people going to work there, that is part and parcel of having a rules based trading system that people will want to come to the United States and take advantage of what is a very solid workforce.

North Carolina is as competitive as any State in attracting foreign direct investment.

Mr. JONES. I appreciate that. I think I have a couple more minutes. I do not disagree with what you are saying or what the chairman is saying.

I will tell you what is really missing. Maybe the chairman when he holds these hearings, maybe we will find a fix to it, but what is happening is yes, the Research Triangle is striving. Even the town in my district, Greenville, North Carolina, where East Carolina University is located, and some other towns, they are beginning to see the re-investment from other countries. There is no question about it.

I do not know how we are going to address this. There is a growing gap. We have a great community college system in North Carolina. It has a great reputation. It does a lot of good, but some of these companies that are coming back, they cannot replace the job that has been lost. They can replace a job but cannot replace all the jobs.

I am for the globalization. I understand we need to have this exchange in investment in other countries, but I think America quite frankly, and you cannot fix this, but when I looked at the fact that we are going to allow Chinese luxury cars to come into this country, and I put a bill in, Mr. Chairman, it was not going anywhere because of WTO, but we are going to charge them, and I might be

a little bit off, to sell the Chinese cars in this country a tariff of about 2.5 percent, and yet we send our cars to China, and they are going to charge us 27 percent.

This is where there might be some who benefit greatly from this exchange of investments. The average citizen in this country is not benefitting. Maybe he or she will in time. In my humble opinion, right now, they are not.

The CHAIRMAN. Will the gentleman yield? I agree on most of that. We are going to be focusing—I think you have hit the number one issue that faces this country today, and that is disparity. We do intend to deal with it.

Mr. JONES. Thank you, sir. I yield back.

The CHAIRMAN. Mr. Malan, I was impressed with you telling him how many jobs there were in North Carolina. Do you have that for every member of the committee or do you have to look it up?

Mr. MALAN. I do not have it here, Mr. Chairman.

The CHAIRMAN. Very impressive. The gentlewoman from New York, and then we are going to go vote.

Mrs. MALONEY. I thank the gentleman from North Carolina for his comments. I feel you made a very important statement.

I thank our chairman for holding this hearing and really moving the CFIUS legislation forward as a priority of the Democratic Congress. I think it is very important to business, and I think it is very important to economic security and national security.

It is one of his first hearings, and I appreciate it. We are having a mark-up so the chairman tells me next week, and I think that is important.

I would like to quickly ask Mr. Bartlett, what is so magical about the 30-day review process? I have heard that from some of my constituents, stick to the 30 days, is if it is some type of magical number. I know it is the same as the anti-trust. Why is that number so important to business?

Very quickly, I would like to ask Mr. Malan and Mr. Marchick, you mentioned that you want the transparency and the predictability, but you also mentioned that the current version of CFIUS should be amended so that the applications by government-owned entities that do not raise a national security issue can be dealt with quickly.

I would like your ideas on how we do that. Some members of Treasury have suggested that a chair or deputy secretary sign off on it and move it forward. I would like your comments on that.

I would like to come back, I think Mr. Bartlett and others have raised the question that you were in opposition to a provision in section six of the current CFIUS reform bill that would allow for a lead agency in monitoring the mitigation agreement, to make modifications to that agreement.

I understand your arguments for predictability and certainty when it comes to the process, but if we do not allow for a modification to an agreement, how would we address situations where there is a substantial change in circumstances that some agency heads may feel is a problem?

I would just open it up to all of you.

The CHAIRMAN. I should note, she has really been a leader in this. We do think it is very important, particularly on our side of



the aisle, to show that the concerns that many of us have over equity and protection of citizens' rights in society are fully compatible with support for the legitimate role that business plays in obviously creating prosperity.

The time constraint is unfortunately not there, so I can insist that you speed up. Go right ahead.

Mr. BARTLETT. Mr. Chairman, I will speed up. The 30 days is important, first of all, because it is certain and it is so relatively quick. All of the agencies have testified they can meet the 30 days easily. In fact, the testimony was more that they would get their work done in 15 or 16 days, which gives some extra time.

This legislation is a balance between national security interests and economic interests of Americans. Remember, direct investment creates jobs in the United States. Restrictions of direct investment, if you restricted it, by 60 days or 90 days, that means you would lose jobs and lose economic benefit to Americans.

Second is the need for it to have a certainty to it. Whether it is 30 days or 29 days or 31 days, it should not be arbitrary. I think the committee knows what happens when the Executive Branch is given the ability to be arbitrary in their decisions, and then 10 years from now or longer, bad things will happen.

As far as the modification, that really is a comment on arbitrariness. We are a nation of laws. If a company goes through a process, any process, that makes a determination that they are "allowed" to invest \$10 billion, to pick a number, of their money to buy an asset, then that sort of provision should stand.

There are adequate national security laws, environmental laws, all kinds of other laws on the books, if something changes in the national security area, to take care of it at that point, but I do not think you should have the uncertainty of an overhang of a transaction involving literally billions of dollars hanging over it indefinitely.

There is also a provision in your legislation that does allow for the two parties to extend the time if they withdraw and then continue discussions, if more information is needed.

If additional information crops up, then any of these agencies would be allowed to deal with it.

Under the current provisions of section six, under the current provision of this modification or this "evergreen," the modification could be done by an individual agency, so it would not have to go back through the CFIUS process, which we think sort of doubles or trebles or quadruples the risk to the economic system.

All and all, have the CFIUS review, either approve or disprove the deal, the transaction, and let it go forward.

Mrs. MALONEY. Would anyone else like to comment on the questions?

Mr. MALAN. Let me just point out that I think it goes back to the analogy of buying a house. We care about the 30 days because it would potentially disadvantage one of my member companies making a purchase in the United States vis-a-vis a U.S. company that would face a Hart-Scott-Rodino review of about 30 days.

The reality of how it works is if there is a CFIUS agency that does not think they have enough time, they go to the company and say, guess what, we do not have enough time. We need more time.

As a way for the market to look at the two systems and say 30 days here, 30 days here, there is a parity there. That is kind of why we care about how the time is set.

Rest assured, if an agency does not think they have enough time, they tell people to go back to the beginning or do not file or whatever. I think that is the real reason why we care so much about 30 days.

Under government-owned companies, I think there is clearly a lot of concern among members of the committee and Congress that on government-owned entities, maybe we are going through the process a little bit too quickly post-Dubai Ports World.

Obviously, you have moved to address that. I understand that. I think one thing you might want to think about doing is providing a little bit of a fast track for those government-owned entities that do not present a concern, and that would therefore not junk up the system.

If VW, which is maybe 20 percent owned by the Bavarian state, would qualify as a foreign-government-owned entity, maybe you have some sort of device that allows them to get 30 day review because they are not the same as CITGO Petroleum, which is an arm of the Venezuelan Government.

Mr. MARCHICK. Let me just add a couple of quick points. On the government-owned company issue, I think one other concern is that foreign governments start discriminating against our government-owned entities, which include Calpers, which include pension funds in New York, Massachusetts, Alabama. Alabama's pension fund last year was the largest shareholder of U.S. Airways.

If they bought a foreign airline in another country or if they bought an asset in another country and that process took longer than it would for a private sector company, that would be discriminating against them, and that would potentially kick them out of the bidding process.

One possibility that we have discussed with you privately is the idea that if there is a government-owned transaction that does not raise a national security issue—take a Canadian pension fund buying a toll road, it is hard to imagine that Canadians are going to block someone from getting on a toll road. I do not know what the national security issue would be—you could have the Secretary or Deputy Secretary of Treasury or other agencies certify that they have looked at this and there is no national security issue. Put their name on the line. Create accountability.

Timing does not equal scrutiny and not all transactions require 60 or 90 days.

The only other thing I would add on the “evergreen” provision is that if someone violates an agreement, they should be punished. If a foreign person uses a domestic company to spy, they should go to jail. We have very strong espionage laws.

If they violate export control laws, there are criminal or civil sanctions. Those should be used and they should be tough as nails.

The “evergreen” provision actually punishes passive shareholders, my 401(k), government pension funds, because it creates uncertainty.

Let's say there is a problem with Alcatel-Lucent in 10 years. There is a move to unwind. Even one agency proposing that, even

if it is not a serious proposal. That stock is going to drop immediately. It is going to hurt passive shareholders. They should punish the individuals or punish the company if they do something wrong, but do not punish passive investors.

Mrs. MALONEY. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you all. As you know, we plan to vote on this in committee in a week.

Any particular further suggestions, and I know there have been some conversations about some changes, some of which were alluded to, but anything specific, obviously get them to us right away. I expect this to be voted on in committee next week and to be on the Floor when we come back from recess.

People should be on notice that this is going to be moving along.

Again, I will say to the gentlelady from New York that even though she has moved from one subcommittee ranking membership to the chairmanship of another, she has sort of taken this portfolio with her, and will continue to be our lead person on it.

The hearing is adjourned.

[Whereupon, at 1:09 p.m., the hearing was adjourned.]



## **A P P E N D I X**

February 7, 2007

U.S. Congresswoman

**Ginny Brown-Waite***Representing Citrus, Hernando, Lake, Levy,  
Marion, Pasco, Polk, and Sumter Counties*

**Committee on Financial Services**  
**“Committee on Foreign Investment in the United States**  
**(CFIUS), One Year After Dubai Ports World”**

February 7, 2007  
 Statement for the Record

Thank you Mr. Chairman for holding this hearing today, and thank you to all the witnesses.

Like most Americans, I was troubled last year over the proposed deal between United Arab Emirates (UAE)-owned Dubai Ports World and the British-owned Peninsular Oriental Steamship Navigational Company. While many of the facts surrounding this case were twisted and glamorized in the media, one thing remained certain – the oversight of foreign investments in America was insufficient. The President himself stated that he was unaware that an organization, the UAE, with strong ties to terrorist-friendly nations would be in charge of the security of our busiest ports. The Committee for Financial Investment in the United States (CFIUS) let America down and drastic improvements were needed.

I was happy to vote in favor of the bill that then Majority Leader Roy Blunt introduced last year to provide CFIUS with more tools it needed to protect America against dangerous foreign investments and mergers. I am equally happy to support its reintroduction by my colleague, Congresswoman Carolyn Maloney, H.R. 556.

H.R. 556 takes the good accountability improvements that CFIUS has made within its organization and puts them in law. It is imperative that provisions such as the 30-day transaction period and requirements that the chairman and vice chairman of CFIUS sign a review of an investigation before it is complete remain in place without waver under future Administrations. I support other accountability measures that require roll call votes by CFIUS members for investigation approvals, stronger briefing requirements to Congress on H.R. 556, and most importantly, that the President is notified of any dissenting votes on a foreign controlled transaction.

Filings by foreign investors with CFIUS increased by almost 75% last year in light of the Dubai Ports deal. Some point to this statistic as a good indicator that CFIUS' new rules are working; others worry that it is an indication that foreign investors have become skittish over doing business in America. I have never been a proponent of spinning more bureaucratic spider webs and am confident that H.R. 556 strikes the balance between protecting America and encouraging investment. I look forward to voting in favor of it again when we have the opportunity.

U.S. Representative Emanuel Cleaver, II  
5<sup>th</sup> District-Missouri  
Opening Statement  
House Financial Services Committee  
“Committee of Foreign Investment in the United States (CFIUS),  
One Year After Dubai Ports World”  
Full Committee Hearing-February 7, 2007

Chairman Frank, Ranking Member Bachus, Subcommittee Chairs and Ranking Members; thank you for holding today’s hearing, “the Committee of Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World.” I am looking forward to hearing the testimony of the participating panelists today and working, in the spirit of civility and bipartisanship, to address the critically important issue of CFIUS reform.

In a post September 11th world, our nation must remain ever vigilant against any and all national security threats. The chief responsibility of the Congress is protecting America against all enemies foreign and domestic. As this new 110th Congress moves forward to address many of the critical issues and challenges facing our country, here in the House Financial Services Committee my colleagues and I, on both sides of the aisle will help to fashion solutions issues and challenges that impact both our national security and our ability to compete and thrive in the global market place.

I believe, as many of my colleagues do, that ensuring our national security and preserving and promoting foreign investment, while enhancing America’s economic competitiveness are not mutually exclusive priorities. In fact, I am confident that the Members of this Committee and both Houses of Congress can and will accomplish both through a bipartisan effort.

I, like most Americans, was fervently outraged in February of last year when the proposed \$6.8 billion purchase of Peninsular & Oriental Steam Navigation, a London-based port operation company that operates six major U.S. ports including New York, Miami, and New Orleans, by Dubai Ports World, a company owned by the government of Dubai, a member of the United Arab Emirates, was revealed in the national media.

As a Member of the House of Representatives, I was particular disturbed that I, and a vast majority of my colleagues, had to find out about this proposed deal through national media accounts as opposed to our counterparts in the Administration.

However, despite the manner in which the Congress was informed of the proposed Dubai Ports deal, I believe that silver lining in this is that the light has been shinned on a vitally important process that affects our national security and economic interests. The House of Representatives recognized that the government mechanism for reviewing foreign investment and acquisitions that could impact national security, the Committee on Foreign Investment in the United States, CFIUS was in dire need of a major overhaul.

Among the significant steps the House Financial Services Committee undertook in the 109th Congress to address CFIUS reform was the introduction of H.R. 5337, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2006 (National Security FIRST Act) which passed on July 26, 2006 by a vote of 424 to 0. This bipartisan legislation, which I voted for, called for strengthening the Committee on Foreign Investments in the United States (CFIUS) process by increasing administration accountability, improving the opportunities for congressional oversight, specifically involving the director of National Intelligence in reviews, and creating a process to track and enforce any agreements to mitigate security threats. I want to thank Subcommittee Chairwoman Carolyn Maloney, Rep. Deborah Pryce, Rep. Joseph Crowley and my fellow Missouri Delegation Colleague, Minority Whip Roy Blunt for their leadership and efforts to help craft this legislation, as well as for crafting H.R. 556, legislation introduced in the 110th Congress that mirrors last year's legislation.

As the House of Representative begins to consider reforms to CFIUS, we must keep in mind the balance between ensuring national security while preserving our nation's preeminent global economic leadership. In my home state of Missouri, U.S. subsidiaries play a significant role in support jobs for Missourians. These subsidiaries provide employment to over 84,000 working men and women in Missouri. In the Missouri manufacturing sector alone, U.S. subsidiaries provide over 38,000 jobs.

The impact nationally is equally as significant, therefore, any reform of the CFIUS process must balance the economic benefits of foreign investment with the reality that there is not a foreign investment that exists or that has or will be proposed that is worth risking our national security. I believe that our efforts today and throughout the 110th Congress will keep American secure and promote foreign investment.

My colleagues and I agree that there is no more important responsibility of the House of Representatives than to ensure the security of the United States. Any conversation about economic vitality cannot exist if our nation is not secure. Our task, our charge in this Congress is to maintain national security and simultaneously attract global investments that are critical to our economy. As the world market becomes smaller and competition from other markets increases, the Congress must take a balanced and careful approach to CFIUS reform.

Again, I look forward to hearing the testimony of today's panelists and to working with both sides of the aisle to address this important issue.



REMARKS OF THE HON. ADAM H. PUTNAM

FINANCIAL SERVICES COMMITTEE HEARING on  
COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS),  
ONE YEAR AFTER DUBAI PORTS WORLD

WITNESSES: Honorable Clay Lowery, Assistant Secretary, U.S. Department of the Treasury, Honorable Steve Bartlett, President and CEO, Financial Services Roundtable, Mr. Todd M. Malan, President and CEO, Organization for International Investment (OFII), Mr. Michael O'Hanlon, Senior Fellow, Foreign Policy Program, Brookings Institution, Mr. David Marchick, Partner, Covington and Burling, LLP, Mr. Robert Nichols, President and COO, Financial Services Forum, Mr. David Heyman, Director, Homeland Security Program, Center for Strategic & International Studies (CSIS)

February 7, 2007

Mr. Chairman, Ranking Member Bachus, I am pleased to join with you and my colleagues today to hear testimony regarding foreign investment and the Committee on Foreign Investment in the United States (CFIUS). It has been almost a year now since the proposed deal that would have allowed Dubai Ports World (DPW) in the United Arab Emirates (UAE) to manage port operations in six U.S. cities took place.

While global competitiveness helps spur our economy, we as a Congress cannot fail to assess potential risks that may result from global transactions. In a post-September 11<sup>th</sup> world, our national security must remain of vital interest and top priority when it comes to the operations and security of our nation's ports and borders.

Congress took serious note and recognized the essential oversight role that lapsed during the Dubai Ports World (DPW) transaction. The House took action, and on July 28, 2006, by a unanimous vote (424-0), we worked together to maintain a preservation of our national security during approval process for foreign investments in the United States.

Reaffirming the “Byrd Rule” the House passed bipartisan legislation that brought light to flaws in the CFIUS process, without impeding job growth or economic expansion.

Practical oversight of such transactions should be of concern not only to our everyday commerce, but to American citizens as well. Balancing our nation’s homeland security and business environment with the global economy was the right measure for Congress to take.

As we move forward in the 110<sup>th</sup> Congress addressing this important issue, it is my hope that we can again pass legislation that brings transparency to the foreign investment process and that dually protects our national security, while still promoting an innovative economy and securing the global marketplace.

I welcome and look forward to hearing the testimony today from our distinguished guests. Thank you Mr. Chairman.

**House Committee on Financial Services**

**Hearing on Committee on Foreign Investment in the United States (CFIUS), One  
Year After Dubai Ports World**

**February 7, 2007**

**Congresswoman Deborah Pryce**

**Written Statement**

Thank you, Mr. Chairman, for holding this hearing today. I also want to thank you for making CFIUS reform a priority in the opening months of the new Congress. Last Congress the National Security FIRST Act garnered unanimous support in the House with strong bipartisan work in drafting the bill. I am hopeful that we can use the momentum created last year and quickly move something to the President's desk early this Congress.

I wanted to thank Assistant Secretary Lowery for being here today, and thank the Treasury Department for being an engaged participant in reforming CFIUS.

We are overdue in giving certainty to the CFIUS process.

The American people deserve certainty that proper oversight and protections are in place to determine if a foreign interments transaction is in our national security and homeland security interests. Businesses investing in the United States deserve certainty that the process by which deals are reviewed is objective and straightforward.

The Dubai Ports World deal awakened Congress to the need to reform the CFIUS process. Internally, the Treasury Department has shown increased scrutiny of transactions. Seven second-stage investigations were conducted last year alone, a number that equals the investigations from the previous five years combined. Increased examination, however, is simply not enough. There is agreement on all fronts that certainty must be institutionalized.

The National Security FIRST Act, reintroduced as H.R. 556, gives us that certainty. This legislation ensures that a Dubai Ports World situation does not happen again in a post-9/11 world. When questions of national security or foreign government ownership arise, accountability is clear, and a transaction moves to investigation. The requirement of the signature of the CFIUS chair and vice chairs on all decisions and improved congressional oversight restores confidence to the process.

H.R. 556 also ensures that we continue to protect U.S. national and economic security, while promoting foreign investment. In Ohio, we have seen the benefits of open markets and foreign investment, welcoming into our communities Siemens, Sodexo, Honda, Lexis-Nexis, and many, many more. H.R. 556 clearly outlines an objective review

process that will encourage future investment in Ohio and elsewhere, and will help protect American companies from possible retaliatory measures by other countries.

I want to thank Chairman Frank again, and my good friend Ms. Maloney, Mr. Blunt, and Mr. Crowley for their continued hard work on this legislation.

Committee Remarks

Honorable Maxine Waters, D-CA-35<sup>th</sup>

“H.R. 556, National Security Foreign Investment Reform and Strengthened Transparency Act of 2007”

February 7, 2007

Mr. Chairman, as you know, I was a strong supporter of, H.R. 5337, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2006, which passed this Committee as well as the House in the 109<sup>th</sup> Congress. First, I want to again acknowledge the work of our distinguished Chairman of the Committee of Financial Services, Mr. Frank and Mr. Gutierrez, Chairman of the Subcommittee on Domestic and International Monetary Policy, Trade and Technology for supporting this bill. Let me also thank Ms. Maloney, a member of

the Subcommittee on Domestic and International Monetary Policy, Trade and Technology, for again introducing this legislation, H.R. 556. In addition, the bill now has 50 co-sponsors.

Last year, the House approved a comprehensive set of reforms to the Committee on Foreign Investment in the United States (CFIUS) process. It is a testament to the diligence of Ms. Maloney and other Members of the Committee on Financial Services that H.R. 556 is being considered so early in this Session.

It has been almost a year since we learned of the Committee of Foreign Investment's (CFIUS) activities related to Dubai World Ports and the implications of the proposed deal for national security. I can genuinely say that the

Members of the Committee on Financial Services have been most directly involved in this issue since that time.

The bill the House passed last year, H.R. 5337, was designed to reform the CFIUS process based on the information gleaned from earlier hearings on the subject. We have heard about the negative impact of cutting off foreign direct investment in the U. S. However, it would be foolish to assume that we would take any such steps to prohibit foreign direct investment. At the same time, we need to consider safeguards to ensure that the CFIUS process is consistent with the original intent of the Congress concerning national security and investments.

It is time that CFIUS operated within the law and that it is made clear who is responsible for what. Another critical issue is how decisions are actually made, and what entity is principally responsible for protecting the national security interests of the nation as they pertain to foreign direct investment.

The bill enables CFIUS to unilaterally initiate a review where an issue of concern is raised; any foreign government backed deal would be subject to review; both the Secretaries of Treasury and Homeland Security must sign off on reviews, while the Homeland Security Secretary would be vice-chair of the Committee; and all reviews are subject to review by the Director of National intelligence.



In addition, everyone knows that transparency and accountability were, in part, at the heart of the Congressional uproar over the Dubai World Ports deal. Importantly, H.R. 556 like its predecessor bill requires that CFIUS report bi-annually to Congress on its activities. This is strong legislation that will only make Congress' job less difficult on the issue of national security and foreign direct investment. Thank you.

THE FINANCIAL SERVICES ROUNDTABLE



Testimony by the Honorable Steve Bartlett, President  
The Financial Services Roundtable  
February 7, 2007

“CFIUS: One Year After Dubai Ports World”

House Committee on Financial Services  
2128 Rayburn House Office Building  
Washington, D.C. 20515

Chairman Frank, Ranking member Bachus and members of the Committee, Thank you for the opportunity to testify on foreign investment and the Committee on Foreign Investment in the United States, or CFIUS. I am Steve Bartlett, President of the Financial Services Roundtable.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$50.5 trillion in managed assets, \$1.1 trillion in revenue, and 2.4 million jobs.

The Roundtable is here today because of the importance of the free flow of capital across borders. Foreign investment is important to the United State's economy and the ability of our companies to invest internationally is equally important. The Roundtable supports H.R. 556 and applauds the leadership of Chairwoman Maloney, Ranking Member Pryce and others, who authored this legislation. The Roundtable supports H.R. 556, with limited modification, because it would reintroduce certainty to the CFIUS process by ensuring reviews are transparent, principal based, and not subject to the winds of political change.

#### **Background**

It seems lately that the watchwords in international business circles are "global competitiveness." And it is true that the American marketplace will have to continue to

be a place of transparency and innovation if we are to remain global leaders in finance and investment. Regulations and guidance for business must be clear and consistent, with costs commensurate to benefit. This has not always been the case of late and we appreciate the Committee's willingness to look at financial regulation in its totality and make adjustments where warranted. Recent activities including the enactment of regulatory relief legislation as well as administrative actions focused on the Sarbanes/Oxley requirements have been important steps in ensuring that a balance between regulations, regulators and the regulated exists.

In light of the important subject of this hearing, the issue of global competitiveness also applies to the ability to attract foreign investment in the United States; we compete with countries throughout the world to attract foreign investment. Foreign investment is not merely desirable, it is essential to our economy. Foreign investment helps provide capital that allows for the expansion and growth of our economy, which helps preserve and create new jobs. Non-U.S. companies established in the U.S. support nearly 5.3 million jobs in this country – almost 5% of American private-sector jobs are provided by foreign-based companies. Individuals or institutions outside of the U.S. hold U.S. assets valuing \$11.5 trillion.<sup>1</sup> No matter how well intentioned, arbitrary requirements on foreign investment serve as a disincentive to foreign investment.

---

<sup>1</sup> The Washington Post, "Xenophobia's Threat to Prosperity," Charles Prince, March 29, 2006

It is also critical that American companies have the ability to invest in foreign countries in a transparent way. With respect to the financial services industry, our country leads the world in offering innovative products and services, and our companies make investments in countries throughout the world. Roundtable members grow, create jobs and return equity to investors through overseas investment. Arbitrary barriers to foreign investment in the United States may be responded to with similar barriers by our trading partners. This runs counter to our country's long held policy of free and open trade.

Of course, some transactions must pass a test beyond the "approval of the marketplace" for we live in a time in which national security threats of all shapes and sizes are taken appropriately with the utmost seriousness. For this reason, we have the CFIUS process.

The Defense Production Act of 1950 contains the relevant mechanism for national security reviews of transactions involving foreign investment that involve foreign control of interstate commerce in the United States. President Gerald Ford delegated his investigative authority to CFIUS in establishing the Committee in 1975.<sup>2</sup> The Committee's role expanded in the late 1980's with approval of the Exon-Florio amendment which authorized the President to block transactions that threaten to impair U.S. national security. Exon-Florio and the implementing regulations issued by Treasury establish a process of voluntary notification, CFIUS review, CFIUS investigation, and

---

<sup>2</sup> Executive Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975)

presidential decision for transactions by or with foreign persons that could result in foreign control of U.S. companies.<sup>3</sup> Section 721 of the Defense Production Act (DPA) gives the president the power to investigate such acquisitions and to suspend or prohibit a transaction if credible evidence leads him to believe that the acquirer might take action that threatens national security.<sup>4</sup> It is important to note that although companies submit voluntarily to the CFIUS review process, not doing so carries the threat of divestiture of the transaction at a future date through presidential action. Essentially, the CFIUS review process provides a stamp of approval and creates certainty for individuals involved in covered transactions.

The fact is that the CFIUS process has worked well at protecting our national security interest while allowing for the free flow of capital. However, the December 2005 CFIUS review of the Dubai Ports World (DPW) acquisition of the London-based company Peninsular and Oriental Steam Navigation Co., which would have put DPW in control of operations at six major U.S. ports created a firestorm of controversy, concern and confusion. Deputy Treasury Secretary Kimmit came before this committee, and virtually all others, last year to explain the transaction. In the end, the public learned that many U.S. ports, including the ports involved in the DPW transaction, were already foreign operated and owned, and that with respect to the DPW transaction, that CFIUS had not “rushed through the deal.”<sup>5</sup>

---

<sup>3</sup> Executive Order No. 12,661 54 Fed. Reg. 779 (December, 27 1988)

<sup>4</sup> Testimony of The Honorable Clay Lowery before the House Financial Services Committee, March 17, 2006

<sup>5</sup> The National Journal's Congress Daily, February 23, 2006

A year removed from the heat and light of DPW, there is no reason to believe that had the transaction gone through that we would be any less secure as a nation. However, it is clear the way in which the transaction became public, and the way it was presented to the Congress, calls for more regularized communication between the Administration and the Congress, and greater accountability within CFIUS before, during and after consideration of an application.

#### **HR 556**

During the process that led to what is now H.R. 556, The Roundtable communicated principles to the Congress that we hoped would guide the drafting of legislation. We support modifications to bring greater certainty and clarity to the process – but not at the expense of introducing more politics into the process or providing disincentive to foreign investment. The Roundtable believes that any changes must:

Ensure that reviews are done in a thorough, fact-based and objective manner so that reviews are beyond public reproach;

Ensure that reviews are focused on national security;

- Provide flexibility taking into account the specifics of each transaction –so they are considered on a case-by-case basis and emerging security threats can be considered;

Continue to be chaired by the Treasury Department;

Ensure that reviews are completed in a timely manner;

Ensure the Administration has the authority to brief Congress after an investigation has been completed, while protecting proprietary business information;

mandatory investigations should be limited to cases where the acquiring entity is both owned/controlled by a foreign government and the transaction affects national security.

Having reviewed H.R. 556, we believe that it appropriately addresses national security concerns while for the most part meeting the principles articulated above. The bill maintains the existing 30 day initial review while providing additional time for complex transaction, and requires the tracking of withdrawals and resubmissions. The bill also requires notices to congressional leadership and all appropriate congressional committees of significant decisions in each investigation and provides a Member of Congress who receives notice the right to a classified briefing on the transaction. Under the legislation, the Committee designees would be required to monitor and enforce any mitigation agreements, with reporting requirements. Finally, the bill would authorize an additional \$10 million solely for the function of CFIUS at the Department of Treasury.

We do suggest two changes to the current bill to ensure certainty. CFIUS should be given leeway to determine whether a foreign government-owned company investing in the United States requires a mandatory investigation. There are many cases where no security threat exists, for example, if a government owned U.S. pension fund such as the California Public Employees' Retirement System (CalPERS), was subjected to a mandatory investigation abroad.



The Roundtable also opposes a provision in Section 6 of H.R. 556 that would allow for a lead agency in monitoring a mitigation agreement, to make modifications to that agreement. The CFIUS review process and any accompanying mitigation agreements provide applicants with assurance that they have received approval from the United States government – a safe harbor – with respect to further requirements (assuming compliance with the mitigation agreements). The Roundtable has even greater concern with respect to such a provision, given the recent action of the Administration in approving the Lucent-Alcatel deal. As part of this transaction, the Administration included a provision, which as we understand it, would allow for the re-investigation of this transaction and for new conditions to be placed on this transaction at a future date.

We do not disagree with the need to monitor mitigation agreements or ensure compliance with conditions put on a transaction, but we do not support providing the Administration with the ability to reopen a completed transaction at a future date. Roundtable member companies finance large business transactions. Changing the parameters of an agreement could change the economic underpinnings on which the financing has been provided. We are concerned that both the Administrations recent actions and the provision contained in H.R. 556 could create greater uncertainty in the marketplace.

**Conclusion**

The Roundtable supports H.R. 556, which enhances the ability of the CFIUS to protect America's national security interests, while preserving our nation's open investment policies. It is our hope that the Committee will incorporate our changes into this legislation and then act to approve the legislation expeditiously. Without this legislation, capital may not be formed and flow to the most deserving, which ultimately costs Americans jobs.

I wish to again thank the Committee for the opportunity to testify.

**“Ensuring National Security While Promoting Foreign Investment  
in an Age of Global Terrorism”**

**Statement before the Committee on Financial Services  
United States House of Representatives**

**by  
David Heyman<sup>1</sup>  
Senior Fellow and Director  
Homeland Security Program  
The Center for Strategic and International Studies (CSIS)<sup>2</sup>**

**February 7, 2007  
Rayburn House Office Building**

Mr. Chairman and other distinguished Members of the committee,

Thank you for the opportunity to testify before you today. I was asked to present a context from a national security and global terrorism perspective for which members might consider reforms to the CFIUS legislation. To do that, I must begin with an aphorism now over a decade and a half old, but ever so important in the context of discussing al Qa'ida and CIFIUS today.

So with all do respect to the members of this Committee: It's the economy, stupid.

The creation of the Committee on Foreign Investment in the United States (CIFIUS) was intended to provide a process for reviewing if foreign investments in U.S. companies would or could potentially harm U.S. national security interests. And it has done this for nearly thirty years.

Up until the September 11<sup>th</sup> attacks, our principal concerns regarding foreign investments in U.S. firms were first, that we did not want critical resources produced by U.S. companies and supplied to the U.S. military to be held hostage in times of

---

<sup>1</sup> The opinions and conclusions expressed in this testimony are the author's alone and should not be interpreted as representing those of CSIS or any of the sponsors of its research.

<sup>2</sup> The Center for Strategic and International Studies provides strategic insights and practical policy solutions to decision makers committed to advancing global security and prosperity. Founded in 1962 by David M. Abshire and Admiral Arleigh Burke, CSIS is a non-partisan, non-profit organization headquartered in Washington, D.C with more than 220 employees. Former U.S. Senator Sam Nunn became chairman of the CSIS Board of Trustees in 1999, and John J. Hamre has led CSIS as its president and chief executive officer since April 2000. More information is available at [www.csis.org](http://www.csis.org).

February 7, 2007

D. Heyman (CSIS)

war; and second, nor did we want to hand our enemies the tools—including so-called dual-use technologies—to wage war against us. So the CIFIUS process was put in place to protect us from these concerns.

But our perspective on what constitutes a national security concern changed dramatically after September 11<sup>th</sup>. And we must understand those changes to fairly consider what should or should not change with regard to the CIFIUS process.

### **A New Context – Changes in the Security Landscape**

To begin with the security landscape, there are considerable changes in terms of who we fight, how we fight, where we fight, and who does the fighting. Let me elaborate on each of these:

First, our adversaries are no longer principally nation-states, but now include non-state actors—terrorists with global reach—as well.

Second, the front lines of war are no longer predominantly trenches across political boundaries; they are in the streets and buildings of our cities and states, at curbside check-ins at airports, turn-styles at stadiums, and in emergency rooms in hospitals.

Third, our battles are no longer fought solely by airmen, soldiers, sailors and marines; they are also fought by epidemiologists, cryptologists, firefighters, citizens and police.

And fourth, the weapons we wield to wage war are not just tanks, missiles or rifles, but also satellites, computer algorithms, vaccines, sensors, and databases.

These changes raise fundamental questions about CIFIUS national security reviews.

In particular, if our perspective on national security has changed, does that automatically mean that CIFIUS reviews should also change to account for these new realities. Could, for example, foreign ownership of critical infrastructure or vital services that sustain our daily lives, pose a new risk to national security in light of global terrorism? Are we at risk of handing terrorists the keys to securing our house by allowing foreign direct investment in critical infrastructure or vital services? This, in the end, was the fear, and the underlying question during the debate over Dubai Ports last summer. I will discuss Dubai Ports later in my testimony.

### **A New Context – The Economy and Changes in Our Understanding of the Threat**

The next change since 9-11 that we must understand is that our economy is a target of the threat. Contrary to what most Americans may believe, Al Qa'ida's goal is not to destroy the United States through direct confrontation—through direct attacks—but rather to provoke America into destroying itself.

There is a nuance here that is important to understand. If we miss the more hidden objective behind terror attacks against the United States—that is, the objective of

February 7, 2007

D. Heyman (CSIS)

provoking America to destroy itself—we may focus our response, our policies, our homeland security on preventing attacks, without an eye on how we may also unwittingly be pursuing a course of action that does not necessarily serve our best interests, but rather may in fact be counter-productive, or worse self-destructive.

In one of his half dozen or more communication tapes since 9/11, Bin Laden warned that al Qa'ida is "continuing this policy [of] bleeding America to the point of bankruptcy." The President made reference to this quote in his remarks last September, but claimed it referred to the goal of direct terrorist attacks. Specifically he said that by "targeting America's financial centers and economic infrastructure at home, [al Qa'ida was] hoping to terrorize us and cause our economy to collapse."<sup>3</sup>

But we know, from Bin Laden's experience fighting the Soviets in the 1980s, and more explicitly from the same October 29, 2004 communication where Bin Laden explains his "bleed America to bankruptcy" policy, that he believes—whether true or not—that al Qa'ida can defeat America in the same manner the Mujahadin fighting the Soviets in Afghanistan contributed to the collapse of the Soviet Union:

"All that we have to do is to send two Mujahedin to the farthest point East to raise a piece of cloth on which is written al-Qa'ida in order to make the generals race there to cause America to suffer human economic and political losses without their achieving for it anything of note other than some benefits to their private companies. This is in addition to our having experience in using guerrilla warfare and the war of attrition to fight tyrannical superpowers as we alongside the Mujahedin bled Russia for 10 years until it went bankrupt and was forced to withdraw in defeat."<sup>4</sup>

Yes, we must protect against future attacks, but it's also the economy.

Today, the U.S. economy is not poised for imminent collapse. And it is far healthier than the Soviet economy was prior to its collapse. But we are wise to heed the lessons of other great powers through out history—namely, that great powers often become complicit in their own downfall by emphasizing military over economic expansion in periods of decline.<sup>5</sup>

---

<sup>3</sup> President George W. Bush's remarks, Capital Hilton, Washington, D.C. on September 5, 2006. Posted at <http://www.whitehouse.gov/news/releases/2006/09/20060905-4.html>

<sup>4</sup> The translated full transcript, provided by the U.S. government, of Osama bin Laden's videotaped message aired on the al-Jazeera satellite television network, was posted on CNN's website November 1, 2004.

<sup>5</sup> For a detailed discussion on this topic see Paul Kennedy, *The Rise and Fall of the Great Powers* (New York: Random House, 1987) and Charles Doran, *Systems in Crisis: New Imperatives of High Politics at Century's End*, (Cambridge: Cambridge University Press, 1991).

February 7, 2007

D. Heyman (CSIS)

### **Risk of Loss of Foreign Investment in the United States**

These changes—in the security landscape and the new understanding of the threat to our economy—provide the backdrop for which you must consider CIFIUS reforms today.

The hearing is focused on economic security. Keeping in mind al Qaeda's strategy, there are two paths to economic self-destruction we must be wary of: on the *demand-side*, we risk spending ourselves to death due to fiscal irresponsibility or irrational expenditures; and on the *supply-side*, we risk discouraging or outright denying foreign investment in the United States because of poorly thought through policies we put in place.

While, I maintain that we have yet to apply effective risk-based formulas for our investments in homeland security, while we have extraordinary outlays in defense spending that must be very carefully thought through, and while current deficits will in effect raise taxes on future generations, it is the supply-side path to self-destruction—discouraging or denying foreign investment—that we must be concerned with in regards to CIFIUS.

### **Dubai Ports**

Which brings us to Dubai Ports.

The Dubai Ports (DP) deal, in my opinion, was a huge debacle. In effect, we denied direct foreign investment to the U.S. by a U.A.E. firm, because of an unfounded fear of an unsubstantiated terrorist threat. Worse, we had a unique opportunity to improve national security and we lost it.

By squashing the deal, what we got—and what we have today—is worse port security than it would have been, had the deal gone through. Dubai Ports had agreed to a number of enhanced security standards at U.S. operations, including, for example, background checks on dock-workers. More, though, they had voluntarily agreed to subject some of their overseas ports to those same standards. When we lost the deal, however, we lost not only the promise of enhanced security at some U.S. ports, but also similar efforts abroad. As a result, security today is actually less with the new operators than it might have been had the deal gone forward with DP World.

### **CIFIUS and Ownership**

What are some of the lessons of Dubai Ports and how the CIFIUS process worked?

1. **Foreign ownership does not and should not be assumed to automatically confer additional vulnerability on a business.** Sadly, our airlines were not foreign-owned, nor were the London subways, nor the Madrid trains. Similarly, it's not as if today our chemical facilities are more secure because they are owned and operated by American firms? Security is independent of ownership.

February 7, 2007

D. Heyman (CSIS)

2. **A firm from a country where there has been known sources of terrorism should not automatically disqualify it from investing in the U.S.** Under this guilt-by-association formulation, the previous terminal operators, P&O, which is a British company, would probably have been forced to divest, given that the U.K. was the source of Richard Reid (the infamous 'shoe-bomber'), the most recent mass-transit attacks, and last summer's failed multiple airplane plot.
3. **The threshold test for CIFIUS national security reviews should be based on two assurances: one, that security of business transactions meet U.S. standards; and two, that U.S. government has the ability and authority to audit and verify that security.**
4. **The CIFIUS process must remain confidential, but more transparent to key members of Congress who are responsible for oversight.** The CIFIUS process was intentionally secret to take be to make critical business decisions outside the white-hot world of politics and competitiveness. Those reasons are still valid.

#### **Broader Implications and Conclusion**

In the end, we are really asking a more philosophical question—do foreigners make us stronger? Does engaging the rest of the world bolster are security, or diminish it?

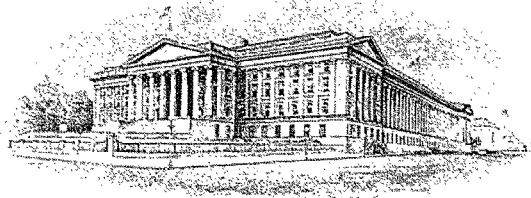
We rely on foreign investment—to the tune now of over \$1 trillion a year—to sustain our economy. We rely on millions of foreign workers to run our businesses. We rely on dozens of foreign countries to enhance and support our military and intelligence operations fighting terrorism around the globe.

Foreign engagement is also about public diplomacy and U.S. influence in the world. A recent Discover America Partnership survey showed that those who have visited the U.S. are 74 percent more likely to have a favorable opinion of the country; and 61 percent believed that a visit to the U.S. would make them more likely to support the country and its policies.

America is deeply interconnected with the nations and peoples of the world. And both her security and economic vitality depend on securing those connections. The question is do we have the safeguards in place to keep our doors open to trade and foreign investment, to keep our borders open to foreign visitors, and our ports to global commerce. That is the goal. That is the heart of what makes America America.

And that is how we will continue to build America's wealth and prosperity in the future.

Thank you and I look forward to responding to your questions.



## **U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS**

EMBARGOED UNTIL 10 a.m. (EST) February 7, 2007  
CONTACT Brookly McLaughlin, (202) 622-2920

### **TESTIMONY OF TREASURY ASSISTANT SECRETARY CLAY LOWERY BEFORE THE HOUSE FINANCIAL SERVICES COMMITTEE ON THE COMMITTEE ON FOREIGN INVESTMENT IN THE U.S.**

**WASHINGTON, DC** – Mr. Chairman, Ranking Member Bachus, and distinguished members of the Committee, I appreciate the opportunity to appear before you to discuss the Committee on Foreign Investment in the United States (CFIUS) and H.R. 556, the “National Security Foreign Investment Reform and Strengthened Transparency Act of 2007”. I am here speaking on behalf of the administration, the Treasury Department, and CFIUS.

First, let me assure the Committee that the administration is committed to improving CFIUS in a manner that continues to protect national security and ensures a strong U.S. economy. To this end, an open investment environment in this country serves as a positive example and thereby supports U.S. investment abroad. We believe the Committee shares these goals, and I look forward to working with you to achieve them.

I appreciate the opportunity to appear before the Committee to discuss the current state of the CFIUS process and update the Committee on the many changes we have made to the CFIUS process since I appeared before this Committee last year. Furthermore, I appreciate the opportunity to discuss the legislation introduced by your distinguished colleague, Congresswoman Maloney, as well as the administration’s priorities for any CFIUS reform legislation.

Before I discuss CFIUS reform and the importance of an open investment climate, I would like to review briefly CFIUS and Exon-Florio.

#### **CFIUS AND EXON-FLORIO**

CFIUS was established by Executive Order in 1975 with the Secretary of the Treasury as its chair. Its central purpose at that time was to monitor foreign investment in the United States. CFIUS was given expanded responsibilities in 1988 following the enactment of the Exon-Florio amendment to the Defense Production Act of 1950. Exon-Florio provides for a national security review of foreign acquisitions of companies engaged in interstate commerce in the United States. It also allows the President to take action, if necessary, to suspend or prohibit a transaction that, in his judgment, threatens the national security if existing laws, other than the International Emergency Economic Powers Act, are not adequate or appropriate to address the threat. The President delegated to CFIUS his authority to investigate transactions under Exon-Florio.



From enactment of Exon-Florio in 1988 through 2006, CFIUS reviewed over 1,700 foreign acquisitions of companies for potential national security concerns. In 2006, CFIUS investigated 113 filings, a 74 percent increase over 2005. This trend appears to continue, as 14 transactions were notified to CFIUS by the end of January 2007. In 2006, CFIUS conducted seven 45-day second stage investigations, the most ever in a single year.

#### **IMPORTANCE OF FOREIGN DIRECT INVESTMENT TO THE U.S. ECONOMY**

The administration views investment, including investment from overseas, as vital to continued economic growth, job creation, and building an ever-stronger America. The free flow of capital in open and competitive markets contributes directly to higher productivity, growth and efficiency. When capital is free to flow in response to market demand, it is used most efficiently, thereby maximizing economic growth. As Secretary Paulson has stated, "The U.S. experience illustrates the benefits of openness and competition. Our economy is by far the world's strongest because it is built on openness – openness to people of all nationalities, openness to new ideas, openness to investment, and openness to competition."

In 2005, foreign direct investment (FDI) into the United States totaled almost \$100 billion, double the annual average in the early 1990s. The stock of FDI in the United States reached almost \$1.9 trillion at the end of 2005. The United States is also the largest investor in foreign markets, with the stock of U.S. direct investment overseas totaling nearly \$2.5 trillion at the end of 2005.

U.S. affiliates of foreign-headquartered multinationals perform a major share of many activities central to continued economic growth and rising living standards in the United States. Inward foreign direct investment benefits the foundations of the U.S. economy -- playing a substantial role in our recent productivity boom. Research has shown that multinational firms are more productive than firms focused primarily on domestic markets. The relatively high productivity of U.S. affiliates of foreign-owned firms is attributable, in part, to their relatively high levels of investment in physical capital, research and development, and exporting and importing. U.S. affiliates account for 5.7 percent of output and 4.7 percent of employment (and one-third of these jobs are in manufacturing); they also account for a major share of U.S. exports (19 percent), imports (26 percent), capital investment (10 percent), and research and development expenditures (13 percent).

A large portion of the benefits of foreign companies' productivity accrues directly to their American workers. Americans working for foreign firms in the United States earned an average annual compensation of over \$63,000, more than thirty percent above average annual compensation for workers in the rest of the economy.

Despite the important and immediate benefits of foreign direct investment in the United States, we have experienced recent controversies relating to particular foreign investments in the United States. These controversies, coupled with some troubling signs that other countries are pursuing barriers to foreign investment, and increasingly negative media coverage of the U.S. investment climate, underscore the need to improve and reform the CFIUS process. It is also important to note that our actions to reform CFIUS are and will continue to be closely watched.

#### **PROTECTION OF NATIONAL SECURITY**

The administration regards our nation's security as its top priority and supports efforts to reform the CFIUS process to address more effectively national security imperatives since 9/11. In just the last year, CFIUS has instituted a number of reforms to address concerns about the CFIUS process raised by Congress, several of which are also proposed in your legislation:

CFIUS now notifies and provides briefings to the Congressional Committees of jurisdiction on every case for which action has concluded under the Exon-Florio amendment.

To ensure accountability, every case is briefed up to senior policy officials within CFIUS agencies and only individuals confirmed by the Senate can certify the conclusion of a CFIUS review.

As chair of CFIUS, Treasury encourages parties to transactions to consult with CFIUS and provide a draft notice before filing a formal notice. Pre-filings give CFIUS more time to consider transactions and result in more detailed formal filings that better address CFIUS's concerns.

Withdrawn transactions are monitored carefully by Treasury and other agencies. Treasury notifies parties that refilings must occur promptly unless the transaction is terminated.

CFIUS has formalized a longstanding policy that allows agencies to request a notice for any transaction that has not yet been voluntarily notified or that was withdrawn and has not yet been refiled.

CFIUS has strengthened its communications and deliberations process. Treasury hosts weekly policy level meetings to discuss all pending CFIUS cases.

The Director of National Intelligence (DNI) has a more formal role. Through the DNI, the intelligence community provides briefings and intelligence summaries on every transaction. Intelligence officials also participate in weekly CFIUS policy meetings.

#### **ADMINISTRATION'S VIEWS ON LEGISLATIVE REFORM**

During the last Congress, this Committee was instrumental in shaping a CFIUS reform bill, H.R. 5337, which passed the House of Representatives unanimously. On September 14, 2006, the administration delivered to the Committee Chairman and Ranking Member its views letter on CFIUS reform. In it, we brought to the attention of the Committee a number of areas where we differed in how we should reach our common goal of enhancing national security and preserving the United States as an attractive environment for direct investment.

As the legislation before us is based on H.R. 5337, I believe it would be useful for me to review the administration's views letter, which reflects our priorities for CFIUS reform. Let me reiterate to the members of this Committee that we stand ready to work with you to ensure that the CFIUS process is improved to protect national security while preserving an open investment climate that creates jobs and continues to support economic growth.

#### **Accountability**

The administration shares Congress's goal of ensuring senior-level accountability. As noted above, we therefore seek the clearance of Senate confirmed officials at the conclusion of all first-stage (30-day) investigations. We believe decisions at the end of a second stage (45-day) investigation should be made at the secretary or deputy secretary level. We also believe all decisions on foreign-government owned cases should be made at the secretary or deputy secretary level.

#### **Mandatory Second-Stage 45 Day Investigations**

The administration believes that a second-stage, 45-day investigation is necessary only if a CFIUS member has identified national security concerns that have not been adequately mitigated during the first-stage investigation or has unresolved questions regarding national security implications by the end of the first-stage investigation. A second-stage investigation should not be required absent these circumstances. It is important that discretion to consider the national security issues raised by any particular transaction is preserved in the legislation.

### **Factors for Consideration**

The administration believes that CFIUS should maintain the discretion to address all issues in a manner that takes into account the relevant facts and circumstances of each case. We support expanding factors for consideration, including, among others, foreign-government control and critical infrastructure.

### **Ensuring Congressional Oversight**

The administration supports enhanced communication with Congress. CFIUS regularly provides your committee information on all cases where action has concluded under Exon-Florio. We have also provided more comprehensive periodic briefings to congressional committees describing the cases investigated and foreign investment trends in the United States. We do not believe it is appropriate, however, to report on the internal deliberations of the Executive Branch, including any positions taken by individual CFIUS members during CFIUS's consideration of a transaction.

### **Extensions of 45-Day Investigations**

The administration believes that the current timeframes for 30- and 45-day investigations are sufficient. Extending these periods may discourage foreign investment or discourage the voluntary filing of notices with CFIUS by generating uncertainty and delay for the parties to a proposed transaction. In addition, our current practice of requesting pre-filing notifications provides additional time and flexibility needed to review transactions.

### **CFIUS Membership and Deliberations**

The President should have the flexibility to determine and adjust CFIUS membership as circumstances develop. We do not believe legislation should mandate the designation of Vice Chairs or mandate that CFIUS include members of the Executive Office of the President (EOP) as statutory members of CFIUS. Legislation should recognize the President's flexibility to designate members of the EOP.

The administration is concerned that additional procedural requirements on CFIUS deliberations, such as roll-call voting, are ill-suited for executive bodies like CFIUS and are inconsistent with the vesting of executive power in the President. Such impediments deter the full and open interagency discussions that are required to consider CFIUS cases properly.

### **Role of the Intelligence Community**

The administration supports the role of the intelligence community as an independent advisor to CFIUS, and thus opposes giving the DNI a policy role, rather than an advisory role. Your legislation does not make DNI a member of CFIUS but would still allow the DNI to trigger a 45-day second-stage investigation, thereby moving them beyond an advisory role to a policy function. As I stated previously, the DNI has a formal role in the process – to coordinate and facilitate the intelligence assessment in each CFIUS investigation. I must also point out that H.R. 556, as currently drafted, retains a timing conflict that was present in H.R. 5337. Both bills state that the DNI “shall be provided no less than 30 days” to complete a threat assessment that will inform CFIUS investigations. This may conflict with the overall structure of the legislation which provides for a first stage (30-day) investigation. We look forward to working with the Congress to provide for a sufficient period of time to conduct the threat analysis and to provide sufficient time for CFIUS to investigate and consider that analysis.

**CONCLUSION**

The current climate has provoked healthy debate within the investment community, both international and domestic, within CFIUS itself, and among foreign governments. We have listened carefully to the views expressed to ensure that we get CFIUS reform right.

In closing, let me emphasize that the Bush administration is firmly committed to keeping the U.S. economy open to international investment while at the same time protecting our national security. Openness at home encourages other nations to lower their barriers which can help advance prosperity and economic freedom in the rest of the world. In short, a domestic climate conducive to foreign investment strengthens national security.

93

Testimony

of

**Todd M. Malan**

President and CEO

Organization for International Investment (OFII)

February 7, 2007

Before the

House Financial Services Committee

Good morning Mr. Chairman, Ranking Member Bachus and members of the Committee, my name is Todd Malan and I am President & CEO of the Organization for International Investment or OFII. Thank you for the opportunity to testify today.

OFII is an association representing the interests of U.S. subsidiaries of companies based abroad or “insourcing” companies. OFII has 150 member companies, which range from mid-sized businesses to some of the largest employers in the United States, such as Honda, HSBC, Sony, AEGON Insurance, Nestlé, Unilever and L’Oreal.

Collectively, insourcing companies employ 5.1 million Americans, pay 32% higher compensation than at all U.S. firms, support 19% of all U.S exports and in 2005 reinvested \$59 billion in profits back into the U.S. economy.

In many respects, my members have the most at stake in regard to potential changes to the Exon-Florio Amendment because they are the companies that most frequently are subject to CFIUS reviews. Several dozen of my members have made acquisitions subject to CFIUS review in recent years and many of my member companies go through CFIUS reviews multiple times each year. In particular, a number of recent cases that have caused consternation in the business community are OFII members.

#### **National Security is the Priority**

In a post-September 11<sup>th</sup> era, protecting U.S. national security is the priority. CFIUS officials typically analyze three factors when determining whether a transaction raises national security concerns:

- *Threat:* In CFIUS’s threat analysis, the agencies try to identify whether there is anything that would raise questions of trust with the buyer. Threat analysis typically relies heavily on information from intelligence agencies.
- Vulnerability:* In CFIUS’s vulnerability analysis, the agencies identify how sensitive the target company’s assets are from a national security perspective.

- *Consequence*: CFIUS then determines the risk to U.S. national security by combining the threat and vulnerability analysis into a “consequence” analysis. In other words, if a buyer had “bad intent” and the target company’s assets created vulnerability, what is the marginal increased risk to U.S. national security?

When functioning properly, CFIUS should use these factors as a triage doctor would in an emergency room. It should quickly analyze and approve non-sensitive transactions in which the buyer does not pose a threat and/or the target does not involve a national vulnerability. This leaves the process able to focus on transactions where the national security risk is significant. Where there are real risks, CFIUS can and should pursue mitigation agreements to address the increase in risk as a result of a transaction. For those few cases where mitigation is not an option, the President has the authority to block a transaction.

#### **The Benefits of Foreign Investment in the U.S.**

In carefully crafting the Exon-Florio Amendment, and the narrow changes to it since then, Congress recognized that foreign investment in the United States makes a positive contribution to the economy. This law is a scalpel, not a meat cleaver. Congress could have chosen to create a broader and more restrictive system that would have resulted in steeper barriers to all foreign direct investment whether or not a transaction implicated national security. It did not. This flexibility is testament to the fact that the United States has long welcomed and benefited from foreign investment. According to the most recent government figures, the facts about insourcing’s contribution to the economy are clear:

- U.S. subsidiaries employ 5.1 million Americans and operate in all 50 states.
- U.S. subsidiaries support an annual payroll of \$325 billion.
- Average compensation per employee is \$64,428 – 32% more than compensation at all U.S. firms.

U.S. subsidiaries are heavily concentrated in the manufacturing sector, with thirty-one percent of all American jobs at U.S. subsidiaries in manufacturing industries.

- Contrary to many people's assumptions, these companies don't just invest here to access our market. U.S. subsidiaries account for nearly 19% of all U.S. exports.
- New foreign direct investment (FDI) totaled almost \$87 billion in 2005.
- U.S. subsidiaries reinvested \$59 billion in their U.S. operations. In other words, profits earned here, stay here.
- U.S. subsidiaries spent \$29.9 billion on U.S. research and development activities.
- Ninety-four percent of total assets owned by foreign companies are from OECD countries.
- Ninety-eight percent of U.S. FDI is from private sector firms -- only two percent of total direct investment (*assets*) is owned by companies that are controlled by foreign governments.

In today's global economy, labels such as "foreign" or "domestic" are less and less relevant. American's own over \$3 trillion worth of foreign companies stock either directly through mutual funds or pension funds. On average 20% of the shares of the foreign companies with the largest investment in the U.S. are actually owned in the U.S. To me, this ownership change blurs the line between "us" and "them."

Global companies invest in the United States because of the size of our market, the quality of our workforce and the certainty and predictability of our legal regime. A few examples:

*Novartis*, the Swiss Pharmaceutical Company, recently decided to invest \$2 billion in high-wage, high-skill jobs when it moved its global research headquarters from Basel, Switzerland to Cambridge, Massachusetts.



*T-Mobile USA*, a U.S. subsidiary of the German-based Deutsche Telekom opened a new customer service center in Missouri last year. The new center creates 700 jobs for the area and will help T-Mobile maintain its *J.D. Power* ranking as #1 for customer service.

*Samsung*, the Korean electronics company, is investing \$3.5 billion in its semiconductor fabrication facility in Austin, Texas. By November 2008 the expansion is expected to have created 700 new jobs with an annual payroll of \$45 million.

*Tate & Lyle*, the British food and industrial ingredient producer, recently announced that it will invest \$260 million to construct the first phase of a new corn wet mill in Fort Dodge, Iowa that will produce ethanol and biodegradable starches for the paper industry.

#### **Concerns about Current CFIUS Process**

Mr. Chairman, global companies are not investing in the United States because our wages are low. If that were the case, Bangladesh would lead the world in inward investment. Rather, they are investing in the United States because our worker productivity is high, our market is large and our regulatory system is transparent and predictable. In fact, in OFII's annual CEO survey, the highest-rated factor in terms of the attractiveness of the U.S. as a location for investment was our workforce.

In a global economy, companies invest where they can maximize the value of their investment. And the United States has historically been the largest and most important market for global investment.

*But that can change.*

Trends within the CFIUS process since the Dubai Ports World controversy are creating more uncertainty for foreign investors. In turn, that uncertainty could lead foreign investors to invest their money elsewhere. If that occurs, both the U.S. economy and national security would suffer.

A recent study published by the National Foundation for American Policy showed that, in the last year, the number of CFIUS filings increased by 73%, the number of investigations jumped by 350% and the number of companies withdrawing their filings with CFIUS grew by 250%. There were more second-stage investigations last year than during the previous five years of the Bush Administration and more than during 1991 - 2000. The number of mitigation agreements - or conditions imposed on companies - more than tripled last year. More specifically, the Department of Homeland Security required an average of 4.5 mitigation agreements per year between 2003 and 2005. Last year, DHS required mitigation agreements in *fifteen* transactions.

While unofficial data suggests that there was growth in foreign investment in 2006, these dramatic changes within CFIUS occurred for another reason - the bureaucracy reacting to the political firestorm over the Dubai Ports World transaction. That controversy was somewhat understandable given that most people became aware of the transaction *after* CFIUS had approved it. Despite some reasonable arguments for the transaction, as well as legitimate concerns, the damage was done because the public and elected officials felt blindsided by CFIUS approval before being able to digest all of the facts. At the very least the DPW controversy is a lesson to companies and their advisors to do a better job in explaining a transaction and its benefits early in the process.

While I don't have insight into CFIUS's review of individual transactions, it is hard to imagine that in 2006 there were suddenly a much larger number of transactions that truly implicated U.S. national security. Rather, I suspect that the CFIUS bureaucracy went into a post-DPW hyper-cautious mode. Caution is warranted, but only when a transaction creates an increase in risk and no other laws are adequate to address the increased risk.

Why should Members of this Committee care of this balance is unsettled? Two reasons: First, if CFIUS agency's employees and resources are distracted with transactions that do not involve a material increase in security risk, it detracts from their ability to review transactions that *do* implicate national security. Second, if global companies begin to view CFIUS as something more than a national security screening process then it could have a negative impact on the United States' ability to attract beneficial foreign investment in areas that have no impact on national security.

Let me elaborate on that latter issue, OFII is concerned that some agencies are taking undue advantage of the leverage inherent in CFIUS. CFIUS should *not* be a fishing expedition for a single agency to address comprehensive industry objectives on a "catch-as-catch-can" basis merely because they have leverage over one industry participant. CFIUS should not be a way for the government to avoid the open and deliberative process of creating rules under normal rule-making procedures, in which public comment and Congressional accountability are present. For example, if the Department of Homeland Security perceives a vulnerability in our telecommunications infrastructure, it should address that vulnerability across the sector, without regard to the ownership of firms. Both elected officials and the public have correctly identified major chemical plants as potentially vulnerable to terrorist attack. Government agencies and the industry have worked to address this. Would it makes sense for security standards or government protections to only apply to a DuPont facility and not one owned by BASF? Of course not. CFIUS agencies should not approach national security vulnerabilities in a piecemeal fashion.

The business community was also troubled by the inclusion of the so-called "evergreen" CFIUS provision in the recent Lucent-Alcatel transaction. The evergreen provision would allow CFIUS to reopen a review and potentially order divestment for non-compliance with an agreement. In December 2006, OFII and three other business groups, the Business Roundtable, Chamber of Commerce and Financial Services Forum, wrote to Secretary of the Treasury Paulson to express our concern with this provision. The letter, of which I would ask that a copy be inserted in the record, states:

The bedrock principle of openness [to investment], however, is challenged when the Executive imposes conditions on investments that effectively allow it to re-investigate transactions, impose new conditions, and even potentially unwind the transaction at any time....Such conditions can chill investment, make those who do invest more cautious about the types of commitments they are willing to give the government in the context of the CFIUS review, and, ultimately, harm the economy.

Mr. Chairman, if a company illegally exports products to a sanctioned country, that company should be penalized under existing criminal or civil laws. If an individual spies on the United States, they should be prosecuted under the Espionage Act and go to jail. And if a company that does business with the U.S. government does not live up to its commitments under a contract or other agreement with the government, it can be barred from doing business or employees can be prosecuted. Ample measures are available to enforce commitments made by companies in the CFIUS process. But the “evergreen” provision – the ability to rip apart companies that have merged their operations on a global basis – is a Sword of Damocles that will impact the market’s valuation of the merged company. If it were ever used, the “evergreen” provision’s punitive power will primarily impact the individual investors who either directly, or through their mutual funds, own the newly combined company. Who would be hurt if the government forced Alcatel and Lucent to separate? The shareholders of the company, over 40% of whom are Americans. “Evergreen” provisions are unnecessary and ultimately would cause undo harm to a broad group of people who have no role in controlling the company.

In my view, the lesson of the Dubai Ports World controversy is that CFIUS and the parties to a transaction need to do a better job communicating with Congress and ensure that Congress has greater visibility into the CFIUS process. In the aftermath of DPW, I don’t think that Congress intended to signal to CFIUS that it should lower its threshold for reviewing transactions or use the process to address vulnerabilities across an industry sector. At the end of the day, I think Congress and the American people expect CFIUS to zealously focus on transactions that represent a material increase in the three factors I outlined previously (threat, vulnerability and consequence) while dispensing with

transactions that provide beneficial international investment and have little connection to national security.

**Does CFIUS Need To Be Changed?**

OFII supports H.R. 556 with a few changes as outlined below. Mr. Chairman, we appreciate your work, as well as that of Ms. Pryce, Ms. Maloney, and Messrs. Blunt and Crowley, to again put together a balanced bill that protects U.S. national security while welcoming beneficial foreign investment. I also applaud the way that you and others have worked during the 109th and 110th Congresses to ensure that the effort is bipartisan. We have some suggested changes to the bill as outlined below. It's important to note however, that if the bill were to become broader and more restrictive during the remaining legislative process, we would prefer no legislation to bad legislation.

As I previously stated, CFIUS has changed itself in the wake of the Dubai Ports World controversy. Some of those changes are positive. Transactions are regularly being reviewed at a much more senior level. New staff and resources have been added at Treasury and other agencies. Coordination with the DNI and other intelligence agencies has improved. Enforcement of agreements has improved. And most importantly, CFIUS has improved communication with Congress through notifications after reviews have been completed, quarterly briefings and the submission of the long-overdue Quadrennial Report.

These improvements to the CFIUS process can and should be memorialized and codified either through an Executive Order, legislation or both. Action by Congress and the Executive branch to provide certainty to both companies and CFIUS agencies is needed. Without action of some sort, the current uncertainty in the market will lead to a chill in beneficial investment. That is why your work is so important.

Allow me to share a few thoughts on some of the principles that OFII believes should be taken into account:

Maintain Time Periods for Reviews and Investigations: As mentioned above, investors need certainty, and a predictable regulatory process is an important component in an investor's calculation. The longer a transaction takes to close, the more uncertainty there will be. In OFII's view, your bill takes the right approach by preserving the initial 30-day review period, which provides CFIUS with ample time to analyze the national security risks - if any - associated with 95% of the transactions it reviews. These represent transactions coming from our closest allies - the UK, the Netherlands, Japan, Australia and the rest of Europe. We believe that the existing time periods under the law are adequate, and CFIUS has ample flexibility to extend their reviews for difficult transactions. It is also important to keep in mind that most parties conduct informal "pre-notification" meetings with CFIUS agencies to begin to flesh out issues prior to formally filing. As such, our preference would be to maintain the existing statutory time frames. However, if Congress wants to give CFIUS additional time, it is much preferable that Congress do so by giving CFIUS additional time after a second-stage investigation rather than changing the initial 30-day review period.

I am concerned, however, that the provision in the bill which gives the DNI a minimum of 30 days to complete its review will inadvertently force transactions into a second-stage investigation. My understanding, based in part on Secretary Paulson's letter to the Committee last year, is that the DNI does not believe it normally needs 30 days to conduct its intelligence analysis. The addition of this provision could result in the DNI's not providing its analysis until the end of CFIUS's own 30-day review period, thereby forcing CFIUS either to unnecessarily pursue an investigation or to complete its review without the full benefit of the DNI's analysis. CFIUS has the flexibility to extend its reviews on a case-by-case basis if the DNI states that more time is needed. I hope this provision can be adjusted when you mark-up the bill in Committee.

Communications with Congress: OFII applauds the approach taken in H.R. 556 with respect to communication with Congress. OFII agrees that Congress should be notified after and not during a review or investigation. OFII also agrees that reporting on trend information - the number of filings, the sectors which are receiving investments, the source of investment - is much more important for oversight purposes than detailed

information on individual transactions. OFII also supports the approach you have taken to protect business sensitive and proprietary information.

*Mandatory investigations for government-owned companies:* Some acquisitions by government-owned entities create unique and potentially problematic national security issues. But not all such acquisitions do. By mandating longer review periods for *all* acquisitions by government-owned entities -- even where there are no national security issues -- CFIUS's attention and resources will inevitably be diverted from cases that actually raise national security issues. OFII believes that you should allow companies that may be, in whole or in part, government-owned to be dealt with more expeditiously if a particular acquisition does not raise national security issues. That way, firms with government ownership that don't implicate national security or whose government ownership is benign (i.e. a foreign pension scheme owning a significant portion of a company which is analogous to the Retirement Systems of Alabama owning a significant portion of U.S. Airways) would take up fewer CFIUS resources and move through the process more quickly.

### **Conclusion**

Let me close by complimenting the Chairman and Ranking Member for holding this hearing and for working to create smart and sound legislation on a bipartisan basis. We welcome the focus on the CFIUS review process and the role that foreign investment plays in the U.S. economy. We believe that if both are better understood, they will be more appreciated.

Mr. Chairman, thank you again for calling this hearing. We look forward to working with you, your colleagues and the Administration to enhance America's national security because a more secure nation is one that will attract investment, encourage capital accumulation, and realize long-term economic growth.

**Testimony of David Marchick<sup>1</sup>**  
**Testimony before the**  
**House Financial Services Committee**  
**on**  
**The Committee on Foreign Investment: One Year After Dubai Ports World**  
**February 7, 2007**

Mr. Chairman, I would like to thank you and Mr. Bachus for holding this hearing and for the opportunity to testify.

The leadership of this committee set the tone for a bipartisan approach to CFIUS last year during this Committee's hearings on CFIUS. I was struck by your statement at the April 27, 2006 hearing, that you regretted that the Dubai Ports controversy "could lead us to make changes beyond what is necessary in the law." I hope now that the controversy has subsided, this Committee and the Congress can take a dispassionate look at the issue, as the Committee did last year.

I recently authored a study for the National Foundation for American Policy (NFAP), which, with your permission, I would like to submit for the record and summarize here. I will then offer a few brief comments on steps to improve the CFIUS process either through legislation, an Executive Order, or both.

More than anything else, the NFAP study showed that the CFIUS process has changed since the Dubai Ports controversy -- and changed dramatically. The number of filings has shot up by almost 75%, and the number of investigations, withdrawals and mitigation agreements have grown at a more rapid pace. Mitigation agreements are now much tougher, and CFIUS has stepped up enforcement of those agreements. The process is much, much tougher than ever before.

---

<sup>1</sup> Partner at Covington & Burling LLP and author of "US National Security and Foreign Direct Investment," (Peterson Institute, May 2006).



Unfortunately, these changes have created uncertainty for foreign investors - uncertainty whether to file; uncertainty about how long a review will take; uncertainty about the conditions that will be imposed; and with the Lucent-Alcatel case, uncertainty with respect to whether a deal will be reopened in the future.

Uncertainty can chill investment -- investment that the United States wants, investment that the United States needs and investment that could easily flow elsewhere. I have seen greater caution in the wake of the DPW controversy from both foreign investors and U.S. companies in my own practice. Deals that might have gone forward in previous years did not in 2006 because of political uncertainty.

Since this committee last had a hearing on CFIUS, there have been significant changes abroad as well, proving that what we do here will have repercussions abroad.

Just last week, the Russian government approved two laws. The first would create a CFIUS-like review process for foreign investments in 39 sectors. The second would ban foreign ownership in certain gas, oil, gold and copper assets.

It September, China passed a new regulation allowing the government to block transactions that negatively affect China's "economic security" and state owned enterprises.

Debate has started in Korea about whether they need an Exon-Florio law.

In November, Canada's Minister of Finance called for a "principle-based approach" to address situations where "a particular foreign investment might damage Canada's long-term interests."

The Indian government has begun an internal consultation process on the need for legislation to deal with foreign investments that have national security implications.

Every country has the right - and obligation - to protect national security. But there is a fine line between blocking foreign acquisitions that truly threaten national security and using national security as a pretext for protectionism or other purposes.

As you said last year, Mr. Chairman, the problems that surround the CFIUS process are political ones, not problems with the statute. At the same time, executive and/or legislative action could help calm the waters and restore an environment of predictability and certainty for foreign investors and U.S. companies. Having Congress's good housekeeping seal of approval on the CFIUS process could be helpful.

The Maloney-Pryce bill is a good bill, and I compliment the co-sponsors for their work. At the same time, I would recommend some changes to it.

First, the provision giving the Director of National Intelligence (DNI) a minimum of 30 days to conduct its intelligence analysis does not square with an objective of clearing non-controversial CFIUS cases within 30 days. A 30-day clearance for non-controversial cases is vital in order for foreign investors not to be disadvantaged in the marketplace, since U.S. acquirers also have a 30-day clearance period for antitrust reviews. The DNI should have adequate time to conduct a thorough review - but a minimum time period is unnecessary.

Second, while some acquisitions by government-owned companies have created controversy, not all acquisitions by foreign government-owned entities create national security risks. The Ontario, Canada Teachers Pension Fund recently purchased a number of ports in the United States. It is hard to see how this transaction could threaten U.S. national security. Under the House bill, however, that transaction would have had to go to a second-stage investigation. Mandatory investigations of all acquisitions by government-owned entities could also divert attention from those cases that raise real national security issues - last year, for example, there were 19 such acquisitions. If HR 556 were in place last year, there would have been almost as many investigations in one year as there have been in the entire history of Exon-Florio. In my view, only those transactions that raise real national security concerns go to the second-stage review process.

Third, I would encourage the Committee to adopt two concepts for mitigation agreements. First, mitigation agreements should *only* address the marginal increase in security associated with a foreign investment. Second, mitigation agreements should only address national security risks where other laws or regulations do not provide adequate protection of national security.

Fourth, the bill includes a provision that allows CFIUS to reopen cases in the future for non-compliance with a security agreement. CFIUS has a wide range of tools to punish companies that fail to comply. But a provision that allows CFIUS to reopen a review at any time in the future and potentially unwind transactions creates significant uncertainty for investors.

Finally, as the legislative process moves forward, it is critical that the House stick to its guns with respect to (a) preserving the sanctity of the initial 30 day review period; and (b) refraining from requiring CFIUS to notify Congress and governors about specific transactions before CFIUS completes its reviews.

In addition to your legislative efforts, I would encourage the Administration - based on consultation with you and with your blessing - to issue an Executive Order adopting some of the principles in the Maloney bill and memorializing some of the internal changes CFIUS has already made.

Congress and the executive branch need to find the right balance to meet the twin objectives of protecting national security and promoting investment in the United States. Few disagree that in the wake of the Dubai Ports World controversy trends within CFIUS have become much tougher for foreign investors seeking approval of acquisitions. The pendulum appears to have swung too far and unless it shifts back toward the center, much-needed investment could be chilled and flow to other countries, and U.S. jobs and economic growth will be lost.

Thank you.

NATIONAL FOUNDATION FOR AMERICAN POLICY  
 NFAP POLICY BRIEF » JANUARY 2007

**SWINGING THE PENDULUM TOO FAR: AN ANALYSIS  
 OF THE CFIUS PROCESS POST-DUBAI PORTS WORLD**

**BY DAVID MARCHICK**

**EXECUTIVE SUMMARY**

In the wake of the Dubai Ports World controversy, the process for securing approvals within CFIUS (the interagency Committee for Foreign Investment in the United States) has grown more difficult for foreign investors, adding to uncertainty and increasing the regulatory risk associated with certain foreign acquisitions. Such uncertainty could inhibit investment in the United States. Reviews are taking longer, costs for companies have increased and CFIUS-imposed conditions are tougher.

The more politicized environment surrounding CFIUS has created uncertainty for companies as to whether they should file a transaction with CFIUS. If a company does not file, then it risks CFIUS initiating its own review or opening a review after a deal has been finalized. Given CFIUS's limited resources, a climate that encourages companies to file with CFIUS for transactions with only a limited nexus to national security actually impedes CFIUS's ability to protect national security by compelling CFIUS staff to focus on acquisitions with few genuine security concerns rather than cases that may require greater due diligence. While CFIUS's primary responsibility is to protect national security, a process which creates greater uncertainty for investments unrelated to national security is unlikely to make America more secure. U.S. national security depends in part on the strength of the U.S. economy, access to leading technologies and our relations with other countries. Therefore, Congress and the executive branch need to find the right balance to meet the twin objectives of protecting national security and promoting investment in the United States.

Limiting the pool of potential investors or buyers effectively lowers the value of U.S.-held assets in many sectors, harming business owners, their workers, shareholders and Americans with money invested in stocks, mutual funds, 401(k)s and pension funds. The pendulum has swung too far and unless it shifts back toward the center, much-needed investment could be chilled and U.S. jobs and economic growth will be lost.<sup>1</sup>

To restore confidence and certainty in the process, the President should issue an executive order memorializing the significant changes CFIUS has already implemented and incorporating the positive elements of the House and Senate bills from the 109th Congress, being careful to consult with Members of Congress and also making clear America welcomes investment from abroad.

At minimum, the executive order should establish regulatory guidance on the negotiation and enforcement of mitigation agreements, a subject currently not covered in the regulations (one major exception — DOD has established clear guidance for defense acquisitions). Mitigation agreements are an important tool for CFIUS to address national security concerns but should only address the marginal increase in national risk associated with

a foreign acquisition as opposed to general security concerns that exist regardless of the ownership of a particular company. If Congress chooses to enact legislation it should use as a base and improve upon the bipartisan bill passed in the House of Representatives in 2006. The current statutory timeframes within Exon-Florio mirror the timeframes for antitrust reviews, putting foreign and domestic buyers on a level playing field. Maintaining the initial 30-day review timeframe is crucial for investors. Such legislation should also refrain from requiring CFIUS to notify Congress and governors about transactions before CFIUS completes its reviews.

This analysis identifies several trends within CFIUS, each of which contributes to greater uncertainty for foreign investors:

**More filings, investigations, withdrawals and presidential decisions:** In 2006, there were 113 filings (up 73 percent over 2005), 7 second-stage investigations (up 250 percent) and 5 withdrawals (up 150 percent) during the second-stage investigation period. A number of other transactions were withdrawn during the initial 30-day period. The dramatic increase in filings demonstrates that foreign investors and their counsel are increasingly uncertain about the approval process for foreign acquisitions, leading them to be much more cautious in deciding whether and when to file transactions for CFIUS review. On top of that, the dramatic increase in the number of second-stage investigations and withdrawals suggests that foreign investors are having a much more difficult time closing transactions in a timely fashion. The stakes are high — the value of just one-third of the transactions that were submitted to CFIUS (those that could be calculated based on public disclosures) exceeded \$95.5 billion in 2006.

**Longer reviews:** While statutory timetables have not changed, caution within CFIUS has resulted in longer review times, causing a growing number of transactions to be withdrawn within the initial 30-day period. Seven transactions required a full investigation. Other reviews took even longer. For example, Presidential approval of the Lucent-Alcatel merger came a full seven and one-half months after the merger was announced. If the pattern of longer time periods for CFIUS reviews continues, foreign investors will either be less interested in investing in the United States or U.S. companies will simply refuse to sell to foreign investors because of the risk of lengthy closing times for deals.

- **More mitigation agreements:** CFIUS has also increased the number of "mitigation" or "national security" agreements negotiated as a condition for approval. From 2003-2005, the Department of Homeland Security (DHS) was a party to just 13 mitigation agreements, compared with 15 such agreements in 2006 alone. Foreign investors — particularly in the IT sector and other sectors considered "critical infrastructure" — now face a greater likelihood of being compelled to enter into a mitigation agreement in order to secure CFIUS approval.

- **New, unprecedented terms:** CFIUS approval has commonly been understood to provide transaction parties with a legal “safe harbor” against a future divestment order by the President. This legal certainty has been an important prerequisite for foreign investors to invest in the United States. However, in the Alcatel-Lucent case, CFIUS required the parties to agree that the CFIUS review could be reopened and divestment potentially could be ordered if the “parties materially fail to comply with any of” the terms of a negotiated security agreement.

**BACKGROUND**

In February 2006, a political explosion erupted over the controversial and ultimately aborted effort by Dubai Ports World, a ports operator based in the United Arab Emirates, to acquire certain U.S. port operations from a British company. This controversy became more than an “inside the beltway” event. A survey by the Pew Research Center for the People and the Press revealed at the time that a remarkable 41 percent of Americans said they closely followed the issue — just slightly less than the 43 percent of those who said they closely followed the war in Iraq.<sup>2</sup> In 2006, 20 bills were introduced in Congress that would have restricted foreign investment. While none became law, the House and Senate both passed but did not reconcile before adjournment two very different bills on the subject.

Even without statutory changes, the process to review foreign acquisitions of U.S. companies for national security implications has changed significantly. These reviews are performed by the Committee on Foreign Investment in the United States (CFIUS), which is a twelve agency committee chaired by the Secretary of Treasury and staffed by experienced career professionals. The agencies include the Departments of Defense, Justice, Homeland Security, Commerce, State and several White House agencies, including the National Security Council. CFIUS implements the Exon-Florio Amendment, which granted the President the right to block foreign acquisitions that threaten U.S. national security.<sup>3</sup>

In 2006, CFIUS filings increased by more than 70 percent and the number of second-stage “investigations” exceeded the previous four years combined. The stakes are high — foreign investors employ more than 5 million Americans. In 2006 alone, just the transactions CFIUS reviewed whose value could be calculated based on public disclosures by companies (approximately one-third of CFIUS-reviewed deals) were valued at more than \$95 billion.<sup>4</sup> And other countries have already shown a willingness to impose their own investment restrictions against American companies. Thus, achieving the right policy mix is of paramount importance. The dramatic increase in filings, the increase in second-stage investigations and withdrawals, as well as the greater likelihood that a mitigation agreement will be required, means that more and more foreign investment in the United States is being regulated, raising costs and uncertainty for foreign investors.

In many respects, the professional staff within CFIUS is simply responding to the criticism from Congress during the Dubai Ports World transaction. No one in CFIUS wants to have another DP World-like explosion in the media or in Congress. CFIUS also has a strong record of protecting national security. No acquisition, to my knowledge, has been approved by CFIUS and later found to undermine U.S. national security. Yet because of Congressional criticism and heightened sensitivities with respect to security, companies that make investments with only a marginal nexus to national security are finding the process difficult, costly and lengthy. The pendulum has swung too far, particularly with respect to foreign acquisitions in the IT sector.

**THE RAPIDLY EVOLVING CFIUS PROCESS**

CFIUS reviews foreign acquisitions of U.S. companies for national security risks upon a voluntary filing (or “notice”) by the transaction parties. The transaction parties also may — and often do — engage in informal consultations with CFIUS agencies well before a notice is filed. Under the statute, CFIUS has thirty days after a notice is filed to review a transaction. For complicated transactions, or if there are disputes between agencies, CFIUS can extend the process to a second-stage review, or “investigation,” lasting another 45 days. At the end of the second-stage investigation, CFIUS agencies provide a report to the President, who then has 15 days to decide whether to block a particular transaction. Parties to an investment also have the flexibility to withdraw and refile in order to avoid a second-stage “investigation.”

In the 18 years that Exon-Florio has been in force, there have been slightly more than 1700 CFIUS filings. Only one transaction has formally been blocked by the President — a 1990 aerospace investment by a Chinese company. From the data, one would think that CFIUS has merely been a rubber stamp, approving 99.9 percent of the acquisitions. The data belie actual practice, since tough restrictions are imposed by CFIUS as a condition for approval — typically through “mitigation” or “national security” agreements. In addition, parties typically will abandon a transaction in the face of a possible rejection rather than force the President to formally block a proposed acquisition. The public relations damage to a company if a President were to block an acquisition would be substantial.

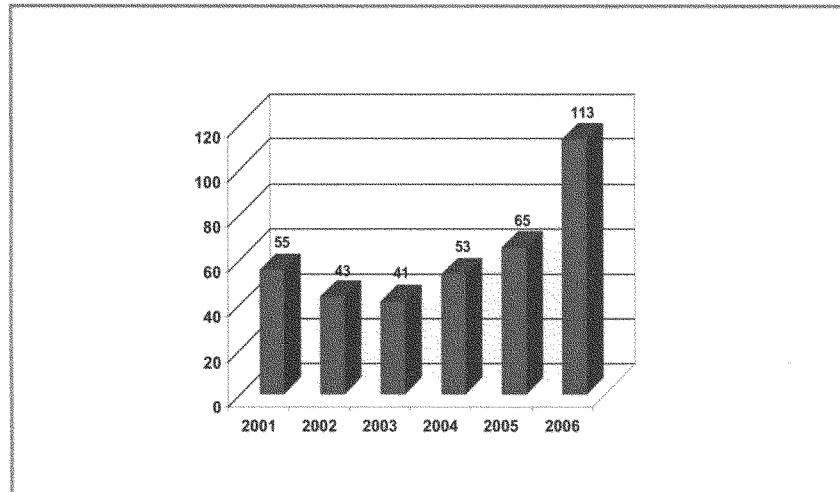
**RESTRICTIVE TRENDS WITHIN CFIUS**

The CFIUS process underwent significant changes in 2006, even without new legislation. These changes included:

**More filings, investigations, withdrawals and presidential decisions:** In 2006, there were 113 filings (up 73 percent over 2005), 7 second-stage investigations (up 250 percent) and 5 withdrawals (up 150 percent) during the second-stage investigation period (see Figures 1 and 2). A number of other transactions were withdrawn during the initial 30-day period.<sup>5</sup> Some of these transactions were re-filed and other transactions never went forward. Two transactions — Dubai Holding’s acquisition of Doncasters and Alcatel’s acquisition of Lucent — were sent to the President for a decision. The data demonstrate two unassailable facts: (i) companies and their counsel are filing cases that would not have been filed the previous year; and (ii) transactions are being scrutinized like never before.<sup>6</sup> All of this is evidence of CFIUS’s caution and extraordinary scrutiny in reviewing transactions post-Dubai Ports World.



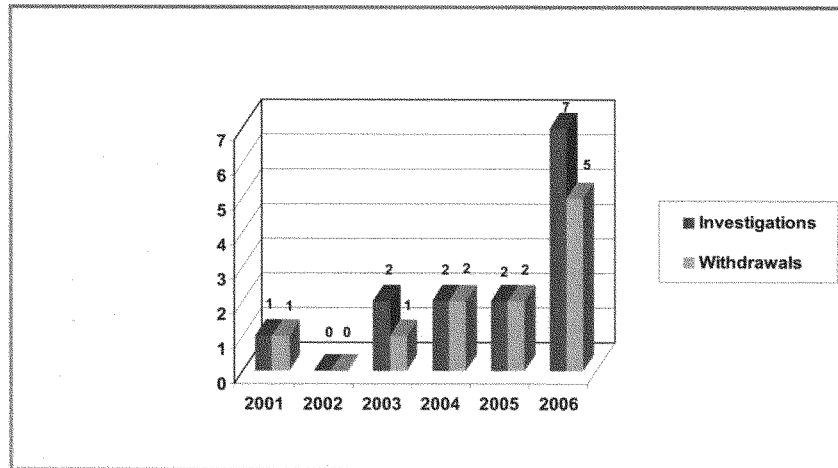
**FIGURE 1**  
**CFIUS FILINGS GREW BY 73% IN 2006**



Source: U.S. Department of the Treasury

- **Longer reviews:** While the statutory timetables have not changed, the more sensitive environment has resulted in longer review times for a number of transactions. Moreover, a number of transactions were withdrawn within the initial 30-day period, most likely because companies wanted to provide CFIUS with additional time to complete the review without entering the second-stage "investigation." Another five transactions required a full investigation. Other reviews took even longer. For example, Presidential approval of the Lucent-Alcatel merger came a full seven and one-half months after the merger was announced. Pre-filing consultations and withdrawals provide CFIUS with important flexibility without expanding the statutory timelines for all transactions. At the same time, if the pattern of longer time periods for certain CFIUS reviews continues, foreign investors could be less interested in investing in the United States.

**FIGURE 2**  
**FREQUENCY OF INVESTIGATIONS AND WITHDRAWALS HAVE**  
**GROWN POST-DUBAI PORTS WORLD**



Source: U.S. Department of Treasury; National Foundation for American Policy

- More mitigation agreements:** CFIUS has also increased the number of "mitigation" or "national security agreements" negotiated as a condition for approval. For example, in 2006 DHS required more mitigation agreements than in the previous three years combined — DHS was a party, along with other agencies in certain agreements, to 15 mitigation agreements in 2006. By contrast, from 2003-2005, DHS was a party to only 13 mitigation agreements. Foreign investors now face a greater likelihood of having to enter into a mitigation agreement in order to secure CFIUS approval. This is particularly the case in the information technology sector and other sectors considered "critical infrastructure."
- New, tougher terms:** CFIUS has also increasingly imposed tougher conditions on companies as a condition for approval. One of these provisions, the so-called "evergreen CFIUS" provision, which allows

CFIUS to reopen a review and potentially order divestment for non-compliance with an agreement, drew criticism when its existence became public in the Alcatel-Lucent merger. CFIUS review and approval has commonly been understood to provide transaction parties with a legal safe harbor against divestment. This legal certainty has been an important prerequisite for foreign investors to invest in the United States. In the Alcatel-Lucent case, however, CFIUS required the parties to agree that the CFIUS review could be reopened if the "parties materially fail to comply with any of" the terms of a negotiated security agreement.<sup>7</sup> The U.S. business community reacted negatively to the news that the "safe harbor" had been eliminated for Alcatel and Lucent. In a December 5, 2006 letter to Treasury Secretary Paulson, four major business groups complained that:

The bedrock principle of openness [to investment], however, is challenged when the Executive imposes conditions on investments that effectively allow it to re-investigate transactions, impose new conditions, and even potentially unwind the transaction at any time....Such conditions can chill investment, make those who do invest more cautious about the types of commitments they are willing to give the government in the context of the CFIUS review, and, ultimately, harm the economy.<sup>8</sup>

This "evergreen" CFIUS provision could negatively alter the incentives of foreign investors to invest and file with CFIUS.

## OTHER CHANGES TO CFIUS

The CFIUS agencies have also taken steps to strengthen the process for national security reviews. Below are some of these additional changes to the process that bear mention:

Higher-level reviews: One of the criticisms of CFIUS during the Dubai Ports transaction was that the issue was not handled at a sufficiently senior level. Congress complained that neither the President, the Secretaries of Treasury and Homeland Security nor other senior officials knew about CFIUS's review. In response, most CFIUS agencies regularly brief either their Secretary or Deputy Secretary on every single transaction. CFIUS regularly meets at Deputy, Assistant or Deputy Assistant Secretary level to discuss particular cases and/or CFIUS policies and procedures.

- More reporting to Congress: CFIUS has also increased the level and frequency of reporting to Congress. The Department of Treasury and other CFIUS agencies are now promptly notifying Congressional

committees with jurisdiction over foreign investment issues upon the completion of every case before CFIUS.

**Additional Resources:** A number of CFIUS agencies have significantly increased staff resources and internal coordination within agencies to ensure all relevant factors are considered in CFIUS reviews. The Department of Treasury, for example, created a new position — Deputy Assistant Secretary for Investment Security — and recruited a National Security Council (NSC) official to run the day-to-day CFIUS process. The Department of Homeland Security has significantly expanded its resources and recruited lawyers and policy experts from blue chip Washington law firms and think tanks to fill these slots. The Departments of Justice and Defense have also augmented staffing, and the Department of Justice (DOJ) has moved the CFIUS function to the newly created division at DOJ handling homeland security. The Department of Defense regularly vets transactions with more than a dozen divisions and departments in the Pentagon and regularly briefs either the Deputy Secretary or Undersecretary on particular transactions. Finally, the Director of National Intelligence (DNI), through the National Intelligence Council, has improved coordination among intelligence agencies to insure that all relevant intelligence community agencies participate fully in the development of final intelligence assessments that are provided to CFIUS.<sup>9</sup>

**Enhanced enforcement of agreements:** CFIUS agencies have also strengthened and enhanced their efforts to enforce national security agreements. These efforts include regular meetings with parties to a transaction during which the foreign investor is asked to explain and document implementation efforts provision-by-provision. CFIUS agencies have also increased the frequency of on-site audits by DOJ, the FBI or DHS.

In short, CFIUS has changed significantly over the last year. A number of these changes are positive — e.g., enhanced communications with Congress will provide those with oversight responsibility with greater visibility into the CFIUS process and hopefully greater confidence in it. The CFIUS agencies also deserve credit for devoting more resources to the CFIUS review process, being more responsive to queries from the parties and for ensuring compliance with agreements. CFIUS staff are highly professional and work extremely hard. In difficult cases, it is not unusual for officials within the CFIUS process to be working late into the night and over weekends in order to resolve issues.

On the other hand, the cautious environment within CFIUS post-Dubai Ports World has spilled over to the private sector. Transaction parties are now frequently filing cases with only a tenuous nexus to national security and withdrawals are occurring more frequently. Unless there is a change in the environment, even more transactions

*Swinging the Pendulum Too Far: An Analysis of the CFIUS Process Post-Dubai Ports World*

will be filed without a real nexus to national security, potentially changing CFIUS from a national security review process to more of an investment review process.

The increase in filings is also problematic as it could stretch the agencies' abilities to focus on the cases that actually might pose a threat to national security. In addition, the current environment within CFIUS often is one in which the agency that takes the hardest line position will frequently carry the day. This environment has resulted in tougher mitigation agreements.

Many of the changes discussed above are a natural reaction among the agencies to the political firestorm over Dubai Ports World. Collectively, however, the revisions to the CFIUS process over the last year have produced the undesirable result of creating uncertainty for foreign investors. Investors seek certainty that a transaction can close in a timely manner. Without certainty, investors simply won't invest.

### **IMPORTANCE OF FOREIGN INVESTMENT: WE NEED MORE, NOT LESS**

Economic literature has long established clear and convincing evidence that foreign investment in the United States supports high-wage, high-skill jobs, particularly in the manufacturing sector, and strengthens the United States' leading position in cutting edge research and development (R&D).<sup>10</sup> Majority-owned affiliates of foreign companies employed 5.2 million U.S. workers in 2004, representing close to 5 percent of total U.S. private sector employment. Importantly, the average salary for these workers was \$60,000, 34 percent more than the compensation by the average American-owned firm.<sup>11</sup>

Foreign investment is also critical to the vibrancy of the U.S. manufacturing sector and to R&D activity in the United States. While foreign-owned firms employ about 5 percent of all U.S. workers, almost 20 percent of all foreign investment flows to the U.S. manufacturing sector. Roughly 40 percent of U.S. jobs in foreign-owned companies are in the manufacturing sector.<sup>12</sup> Finally, notwithstanding the fact that most firms tend to invest in R&D near their corporate headquarters, the data demonstrate that the United States receives a disproportionate amount of R&D spending by foreign-owned firms. Indeed, levels of expenditures in percentage terms by foreign-owned affiliates in the United States are only slightly less than R&D spending by U.S.-owned multinational companies. In some sectors, including the computer manufacturing and information technology (IT) sectors, affiliates of foreign firms spend a greater portion of overall investment on R&D than U.S. parent companies do.<sup>13</sup>

The data also show that most investment comes from countries that are close allies of the United States and for which there should be little or no risk to U.S. national security. Specifically, companies based in the 25 developed democratic member countries of the OECD (Organization for Economic Cooperation and Development) own 94

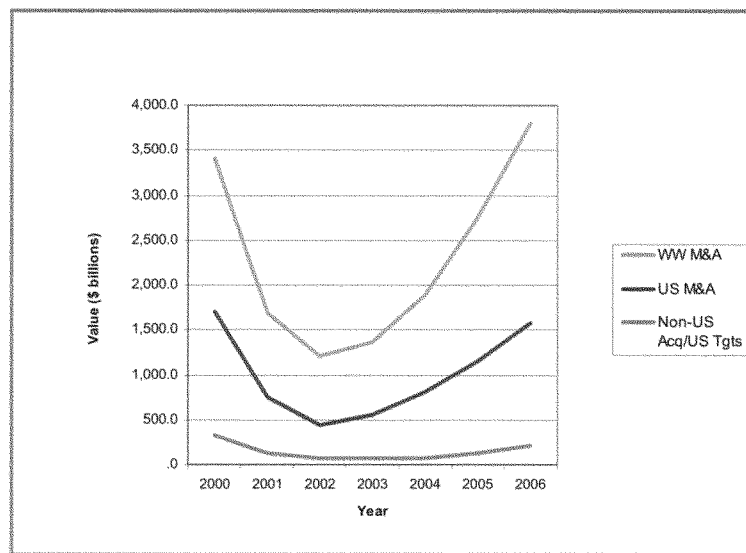
percent of foreign assets in the United States, and 73 percent of all foreign investments in the United States are made by European companies.<sup>14</sup>

In sum, foreign-owned companies create millions of high-wage, high-skill jobs and are key to the strength of the U.S. manufacturing and research bases. If this is the case, shouldn't the U.S. government seek to attract more, not less, foreign investment?

As Figure 4 (see Appendix) shows, jobs associated with foreign investment grew rapidly between 1985 and 2000 but have since dropped by 10 percent. While data are not yet available for 2005 and 2006, non-official data suggests that 2006 was a record year for overall merger and acquisition activity and there was strong growth of foreign acquisitions of U.S. companies in the United States, although foreign investment levels remain well below levels in 2000. Despite the apparent increase in foreign investment in 2006, one has to ask whether the overall level of foreign investment in the United States would not have been even greater in the absence of the uncertainty created by the Dubai Ports controversy. Indeed, as Figure 3 shows, merger and acquisition activity globally and between U.S. companies has grown much faster than the growth rate of foreign acquisitions of U.S. companies. Anecdotal evidence among investment bankers and CFIUS attorneys suggests that a number of significant foreign acquisitions did not go forward in 2006 due to concerns about CFIUS. These transactions did not go forward either because the foreign investor did not want to go through the CFIUS process or because of concerns that conditions imposed by CFIUS would have put them at a competitive disadvantage vis-à-vis their American competitors.

Similarly, as Figure 5 (see Appendix) shows, capital investment in the United States by U.S.-based multinationals has plummeted by 25% since 2001, while capital investment by affiliates of foreign companies has steadily inched upward. Again, while data for 2005 and 2006 have yet to be published, it is clear that maintaining an attractive climate in the United States for foreign investment is critical for overall levels of capital investment, a driver of overall economic growth.

**FIGURE 3:**  
**WORLDWIDE MERGERS & ACQUISITIONS BY VALUE**



Source: Thomson Financial

**WHAT NEXT FOR CFIUS?**

Notwithstanding a significant amount of effort, on a bipartisan basis, toward passing CFIUS reform legislation by, among others, Senators Richard Shelby and Paul Sarbanes, and Representatives Roy Blunt, Deborah Pryce, Mike Oxley, Barney Frank, Carolyn Maloney and Joe Crowley, in 2006, Congress never reconciled the House and Senate bills amending Exon-Florio. On January 18, 2007, Representatives Maloney, Blunt, Pryce and Crowley introduced H.R. 556, which is the same bill that passed the House of Representatives in 2006. Meanwhile, the executive branch has been busy implementing its own reforms to CFIUS and has been considering whether to issue an executive order to memorialize these changes.<sup>15</sup> What is the best way forward?

Senate Banking Committee Chairman Chris Dodd (D-CT) and House Financial Services Chairman Barney Frank, both of whom are strong supporters of foreign investment, have both indicated an interest in holding hearings on CFIUS and pursuing legislation to amend Exon-Florio. Regardless of whether the Congress acts, the President should issue an executive order memorializing the changes the Bush Administration has already implemented and incorporating the positive elements of the House and Senate bills from the 109th Congress. For example, an executive order could:

- Establish a process for the issuance of more detailed reports to Congress on transactions CFIUS has reviewed, as well as trends in filings, mitigation agreements, the countries from which investment is flowing and the sectors into which investment has flowed.

Establish regulatory guidance on the negotiation and enforcement of mitigation agreements, a subject currently not covered in the regulations. In particular, the executive order should provide guidance on the roles and responsibilities of individual agencies versus CFIUS as a whole in deciding on the terms of mitigation agreements. The executive order should also clarify that the principle established in the statute for presidential action — that the President can only block a transaction if no other law or regulation other than Exon-Florio or the International Emergency Economic Powers Act enables the President to protect national security — extends to negotiation of mitigation agreements. In other words, mitigation agreements should address the marginal increase in national risk associated with a foreign acquisition as opposed to general security concerns that exist regardless of the ownership of a particular company.

- Clarify the factors to be considered in conducting national security reviews of foreign acquisitions — these factors were originally adopted in the Exon-Florio Amendment in 1988 and need to be updated.

Articulate which cases will be reviewed by higher-level officials.



Provide clearer guidance on the government's view of how to protect "critical infrastructure" assets that truly are vital to U.S. national security, and how foreign ownership of critical infrastructure could create a national security risk.

- Clarify the role of the White House agencies in the CFIUS process. Unlike other national security interagency processes, which are led by the National Security Council, the NSC and other White House agencies typically take a passive role in CFIUS reviews unless a particular transaction is winding its way toward the President's desk. But these agencies were added to CFIUS by executive order and can and should play a leadership role, particularly in resolving disagreements between other agencies.

To ensure political buy-in from Congress, the administration will need to undertake serious and extensive consultations with Congress before issuing an executive order.

New legislation would only be beneficial if it is balanced and does not chill foreign investment. The primary benefit of legislation would be the placement of Congress's "stamp of approval" on the CFIUS process, thereby reducing Congress's incentives to politicize the process or block a transaction after CFIUS has already completed its review, as was the case in the Dubai Ports World case. If Congress moves to pass legislation, it should be guided by the following principles:

- Timing matters most. With the exception of price, the most important factor for foreign investors or for U.S. companies selling a business is the time — and associated risk — to close a transaction. In many respects, transactions are akin to selling a house. If a seller has the choice of selling to one buyer who can close in 30 days and another who will take 60 days, a rational seller will always chose the buyer who can close first, unless the other buyer will pay a significant premium. The longer a transaction takes to close, the greater the risk and the greater the uncertainty. More uncertainty makes investors less likely to invest. The statutory timeframes within Exon-Florio mirror the timeframes for antitrust reviews, putting foreign and domestic buyers on a level playing field. CFIUS has extraordinary flexibility to extend reviews for tough cases — maintaining the initial 30-day review timeframe is crucial.

Enhance Congressional oversight, not involvement. Legislation should find the proper balance between ensuring that Congress has sufficient confidence in the CFIUS process, while at the same time allowing CFIUS agencies to do its job without Congressional interference in particular reviews. This balance is critical in other regulatory regimes, including antitrust reviews. The House bill achieved this balance by requiring extensive reporting to Congress after CFIUS completed reviews while at the same time protecting business confidential information. It also refrained from requiring CFIUS to notify Congress and governors about transactions before CFIUS completed its review.

Interagency checks and balances are important. Unlike virtually every other regulatory process, CFIUS reviews are unique because the President's decisions cannot be challenged in court. As a result, given the significant stakes involved, it is even more important that CFIUS get decisions right. One of the ways to improve decision making is to ensure that agencies with particular expertise have some lead responsibility while at the same time ensuring that all decisions, including with respect to mitigation agreements, are made with the concurrence and involvement of all CFIUS agencies. One model that has worked well is that within the Department of Defense, which has created a template security agreement for foreign acquisitions of U.S. companies with classified contracts. This model has increased the level of certainty for foreign investors in the defense sector because the expectations of the parties are clear. CFIUS could approve of other similar templates and give particular agencies freedom to negotiate security agreements within those parameters. Even for experienced CFIUS hands, it is often hard to anticipate what type of mitigation measures will be required for foreign investments in "critical infrastructure," increasing the uncertainty associated with an investment.

- Not all acquisitions by government-owned companies create national security risks. Both the House and the Senate bills created a mandatory requirement for second-stage investigations for acquisitions by government-owned companies. Second-stage reviews make sense for some, but not all, acquisitions by government-owned companies. Whether we like it or not, some of our closest allies still have government-owned companies. Westinghouse, for example, was until 2006 owned by the Government of the United Kingdom. Similarly, the Ontario (Canada) Teachers Pension Fund recently acquired four port operations, including two in New York and New Jersey, from Orient Overseas (International) Ltd. It is hard to see how an acquisition by a British government-owned company or a Canadian government pension fund creates any national security risk. Mandating a second-stage investigation will only force delays, thereby reducing incentives to invest. Rather, legislation should give CFIUS the flexibility to require second-stage reviews where genuine national security issues arise as a result of a foreign acquisition.
- Not all investments in critical infrastructure create national security issues. One of the issues debated in the House and Senate bills in 2006 was how CFIUS should treat foreign investments in "critical infrastructure." One of the challenges that Congress and the executive branch face is how to define critical infrastructure. The Patriot Act and Homeland Security Act define critical infrastructure narrowly: "[S]ystems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." By contrast, the Department of Homeland Security defined critical infrastructure very broadly, covering roughly 25 percent of the U.S. economy.<sup>16</sup> (See Figure 6 in Appendix). In addition to the definition, the Senate and House

*Swinging the Pendulum Too Far: An Analysis of the CFIUS Process Post-Dubai Ports World*

bills differed in their approach. The original language of the main Senate bill required a mandatory investigation into all foreign investments in critical infrastructure. The House bill required CFIUS to consider as a "factor" foreign investments in critical infrastructure. The approach taken by the House is the better approach because not all investments in critical infrastructure create threats. It is hard to see, for example, how a foreign acquisition of a highway or toll road threatens national security.

## CONCLUSION

CFIUS's role in the U.S. economy continues to grow. Last year alone the committee reviewed more than \$95 billion in transactions, a figure likely to grow. When Congress passed the Exon-Florio Amendment in 1988, it stated that "national security" should be interpreted broadly. And the statute has given CFIUS extraordinary authority to expand the scope of issues considered in CFIUS reviews. *At the same time, Exon-Florio was not established to be a generalized investment screening mechanism.*<sup>17</sup>

While a chief function of the U.S. government is protecting national security, chilling foreign investment with little nexus to national security is unlikely to make America more secure. After all, U.S. national security depends on the strength of the U.S. economy and on our relations with other countries. DOD and other security agencies also rely on a diverse pool of contractors to maintain buying power and access to cutting edge technologies. Therefore, Congress and the executive branch need to find the right balance to meet the twin objectives of protecting national security and promoting investment in the United States.

Few disagree that in the wake of the Dubai Ports World controversy trends within CFIUS have become much tougher for foreign investors seeking approval of acquisitions. Reviews take longer, company costs have increased, CFIUS-imposed conditions are tougher, and more deals are being withdrawn than ever before. All of these trends have created more uncertainty for investors, raising the bar for an investment to be economically attractive. The pendulum has swung too far and unless it shifts back toward the center, much-needed investment could be chilled and flow to other countries, and U.S. jobs and economic growth will be lost.

## APPENDIX

### A BRIEF HISTORY OF EXON-FLORIO AND THE CFIUS PROCESS

The 18 years of Exon-Florio can be divided into four distinct periods:

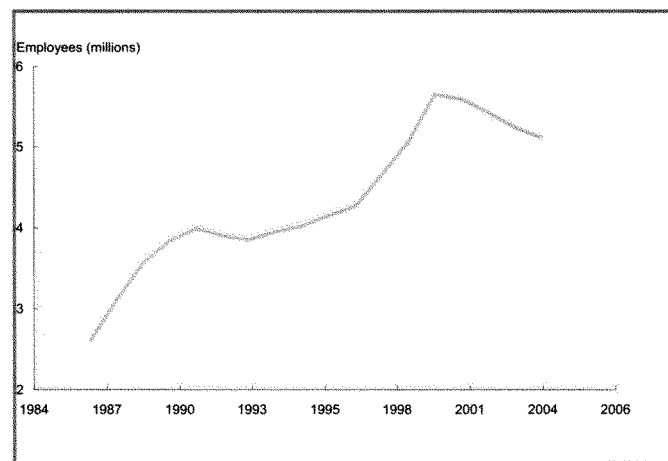
**The Formative Years:** During the first three full years of Exon-Florio (1989-1991), the CFIUS process was marked by significant uncertainty as the CFIUS agencies developed processes and procedures and as lawyers figured out which transactions needed to be filed. Indeed, the initial Exon-Florio regulations that provided guidance to companies and their counsel on the implementation of the law was not issued until November 1991, a full three years after Exon-Florio became law. During this time, Exon-Florio also lapsed for a period of ten months before it was made permanent in 1991. Given the legal and regulatory uncertainty during this period, companies filed a variety of transactions with no relationship to national security, including real estate and retail acquisitions. As a result, there were large numbers of filings — 204 and 295 in 1989 and 1990, respectively, and a relatively large number of investigations — five and six in 1989 and 1990, respectively.

**The Quiet Years:** After the initial burst of activity, caused in large part by uncertainty in the law and regulations, CFIUS entered a relatively quiet period from 1992 - 2001. Fewer transactions were filed (ranging between a low of 55 and a high of 82 annually), despite high levels of foreign investment, particularly between 1996 and 2000, the latter of which was the record year for foreign direct investment (\$330 billion). Between 1992, the last year of the George H.W. Bush Administration, and 2001, the first year of the George W. Bush Administration, there were only six second-stage investigations, five withdrawals and two Presidential decisions. With the exception of a few telecommunications acquisitions after the United States opened its telecommunications market in 1996, there were few, if any, controversial CFIUS reviews.

**The Post-September 11 period:** After the terrorist attacks on the United States in September 2001, and the creation of the Department of Homeland Security (which was added to CFIUS in February 2003), the scope of CFIUS reviews increased dramatically. In particular, CFIUS's scrutiny of investments in "critical infrastructure" intensified. Despite much lower levels of foreign direct investment and fewer filings,<sup>18</sup> the number of CFIUS cases that required second-stage investigations increased. Between January 2003 (DHS joined CFIUS in February of that year) and December 2005, there were six investigations and five withdrawals, more than during the previous decade in total. This period was also marked by much tougher security agreements, particularly in the telecommunications and IT sectors.

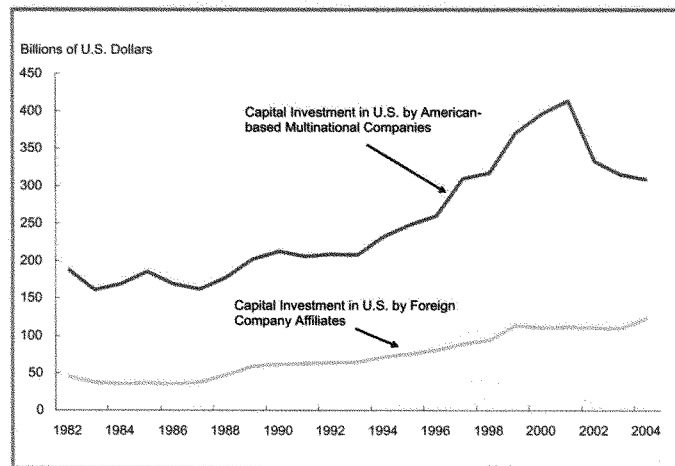
- **The Post-DPW period.** After the Dubai Ports World transaction exploded in Congress and the public in February 2006 (although the Wall Street Journal first reported the transaction on October 31, 2005, and CFIUS approval occurred in early January), Members of Congress introduced more than 20 bills curtailing foreign investment and the House and the Senate passed distinct bills reforming the CFIUS process.<sup>19</sup>

**FIGURE 4**  
**U.S. EMPLOYMENT BY U.S. SUBSIDIARIES OF FOREIGN COMPANIES**



Sources: BEA, BLS.

**FIGURE 5**  
**CAPITAL INVESTMENT BY U.S. MULTINATIONALS AND FOREIGN COMPANIES IN**  
**THE UNITED STATES**



Source: BEA

**FIGURE 6**  
**BROAD PORTION OF U.S. ECONOMY NOW DEEMED**  
**“CRITICAL INFRASTRUCTURE”**

Agriculture/Food	• Energy
Water	• Transportation
Public Health	• Banking and Finance
Emergency Services	• Chemicals
Defense Industry	• Postal/Shipping
Telecommunications	• Information Technology

*Source: National Strategy for the Physical Protection of Critical Infrastructure and Key Assets, March 2003; HSPD-7*

**END NOTES**

<sup>1</sup> Stuart Anderson of the National Foundation for American Policy, and Al Larson, David Fagan, Damara Griffith and Dakota Rudesill of Covington & Burling provided helpful comments and criticisms of drafts of this paper. Thanks also to Dr. Matthew Slaughter of the Council of Economic Advisors at the White House for the data in the charts on U.S. employment by foreign companies and capital investment by U.S. and foreign companies.

<sup>2</sup> Pew Research Center for the People and the Press, Survey Reports, March 15, 2006, available at [www.people-press.org](http://www.people-press.org).

<sup>3</sup> CFIUS was established by executive order in 1975 to monitor inward investment in the United States. It was not until 1988, however, amid concerns about the impact of exploding levels of investment from Japan, that Congress and the President gave CFIUS real teeth. In that year, Congress passed the Omnibus Trade and Competitiveness Act of 1988 and, through the Exon-Florio Amendment to that bill, gave the President the right to block foreign acquisitions of U.S. companies that "threaten to impair" U.S. national security. President Reagan later delegated significant authority for implementing Exon-Florio to CFIUS.

<sup>4</sup> These data were developed by identifying all public disclosures by U.S. or foreign companies that they submitted a voluntary notice under Exon-Florio. Most of the data comes from filings to the Securities and Exchange Commission or the SEC's counterparts in London and Toronto. Note that the \$95 billion figure includes the value of the entire transaction. For example, Dubai Ports purchased all of P&O's global assets for \$5.7 billion. Only six of P&O's ports were in the United States. This data only capture 37 of the 113 transactions that CFIUS reviewed in 2006. However, it is likely that this captures a significant portion of the value of the transactions since most large transactions either involve at least one publicly traded company or are accompanied by a press release. Since CFIUS filings are confidential, it is impossible to provide an authoritative value of the transactions reviewed by CFIUS.

<sup>5</sup> Withdrawals can occur for a number of reasons, including: (i) CFIUS required additional time to complete the review or negotiate a mitigation agreement and the parties prefer to withdraw and refile than enter the second-stage investigation; (ii) CFIUS and the parties reach an agreement during a second-stage investigation, and in turn, the parties withdraw and re-file rather than force a Presidential determination; or (iii) the parties decided to



abandon a transaction either for business reasons or because it becomes clear that CFIUS approval will not be forthcoming.

<sup>6</sup> For example, after initiating a post-closing review of the Venezuelan-owned company Smartmatic's acquisition of Sequoia, a U.S. company that manufactures electronic voting machines, Smartmatic announced that it was "voluntarily" withdrawing its CFIUS notice and planned to sell Sequoia. See <http://www.miami.com/mld/miamiherald/16295058.htm>. Congresswoman Carolyn Maloney (D-NY) first raised concerns about the transaction in May 2006. Smartmatic initially resisted efforts to file the case with CFIUS. See <http://maloney.house.gov/documents/financial/acquisitions/20060511SmartmaticRIs.pdf>

<sup>7</sup> This provision was sufficiently important that Lucent and Alcatel provided notice to shareholders through an SEC filing, which stated: "Under the National Security Agreement, in the event that the Alcatel-Lucent parties materially fail to comply with any of its terms, and the failure to comply threatens to impair the national security of the United States, the parties to the National Security Agreement have agreed that CFIUS, at the request of the USG Parties at the cabinet level and the Chairman of CFIUS, may reopen review of the merger transaction and revise any recommendations submitted to the President." William R. Carapezzi, Jr., Senior Vice President, General Counsel, and Secretary, Lucent Technologies, Inc., Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934, November 17, 2006. See also, Hitt, Greg, "A Higher Bar for Foreign Buyers: Security Terms in Alcatel's Deal for Lucent Signal New Era," Wall Street Journal, January 5, 2007; Page A6.

<sup>8</sup> Letter to Henry M. Paulson, Jr. from the Business Roundtable, Financial Services Forum, Organization for International Investment and U.S. Chamber of Commerce, December 5, 2006, available at [www.ofii.org](http://www.ofii.org).

<sup>9</sup> See Statement of Clay Lowery, Assistant Secretary of Treasury, Before the House Committee on Armed Services, November 14, 2006.

<sup>10</sup> See, for example, chapter 3 of Edward M. Graham and David Marchick, *U.S. National Security and Foreign Direct Investment*, (Peterson Institute, May 2006); and Daniel S. Hamilton and Joseph P. Quinlan, "Protecting Our Prosperity: Ensuring Both National Security and the Benefits of Foreign Investment in the United States," National Foundation for American Policy, June 2006.

<sup>11</sup> See Hamilton/Quinlan, p. 4.

<sup>12</sup> See *Id.*

<sup>13</sup> Graham/Marchick, p. xviii.

<sup>14</sup> Hamilton/Quinlan, p. 3.

<sup>15</sup> See, for example, Testimony of Peter Flory, Assistant Secretary of Defense for International Security Policy, before the House Financial Services Committee, May 17, 2006, available at <http://www.dod.mil/dodgc/olc/docs/TestFlory060517.pdf>. Flory's testimony lays out the criteria DOD utilizes when analyzing the national security risk of a transaction and the vetting process within the Pentagon.

<sup>16</sup> See Graham/Marchick, p. 177.

<sup>17</sup> The House-Senate Conference Committee wrote in its report at the time of passage of Exon-Florio: "The Conferees in no way intend to impose barriers to foreign investment....This section is not intended to authorize investigations on investments that could not result in foreign control of persons engaged in interstate commerce nor to have any effect on transactions which are outside the realm of national security." H.R. Rep. No. 100-576, 926 (1988).

<sup>18</sup> CFIUS received an average of 50 filings per year from 2002 - 2005, well below the averages of 217 per year during the "Formative Years" or 73 per year during the "Quiet Years."

<sup>19</sup> The two bills were: H.R. 5337, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2006, sponsored by Representatives Blunt, Pryce, Maloney, Crowley and 84 other Representatives; and S. 3549, the Foreign Investment and National Security Act of 2006, sponsored by Senators Shelby and Sarbanes. While there were substantive debates over these bills, in the opinion of the author the managers of each bill deserve credit for developing the bills with an unusual and refreshing level of bipartisanship.

**ABOUT THE AUTHOR**

David Marchick is a partner at the Washington-based law firm Covington & Burling, where he advises U.S. and foreign companies on the CFIUS process. He is the co-author, with Edward M. Graham, of "U.S. National Security and Foreign Direct Investment" (Peterson Institute, May 2006). Mr. Marchick served in the White House, USTR and the Departments of State and Commerce during the Clinton Administration. This paper reflects the author's views and not necessarily that of his firm or clients.

**ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY**

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at [www.nfap.com](http://www.nfap.com).

Statement of Robert S. Nichols  
President and Chief Operating Officer  
The Financial Services Forum

Testimony Before the  
House Financial Services Committee

February 7, 2007

Overview

Chairman Frank, Ranking Member Bachus, members of the Committee, thank you for the opportunity to participate in this important hearing on the Committee on Foreign Investment in the United States (CFIUS). In particular, I'd like to thank Chairwoman Maloney and Congresswoman Pryce for their leadership on this critically important issue and their sponsorship of H.R. 556.

I am here as president and chief operating officer of the Financial Services Forum, a financial and economic policy organization comprising the chief executive officers of 21 of the largest and most diversified financial institutions doing business in the U.S. The Forum works to promote policies that enhance savings and investment in the U.S. and that ensure an open, competitive, and sound global financial services marketplace. As a group, the Forum's member institutions employ more than 2 million people in 175 countries and hold combined assets of more than \$16 trillion.

The financial services industry is acutely aware of the serious threats faced by our nation, and the need for Congress to consider all aspects of national security in its decision-making. Addressing threats to U.S. national security must be undertaken with absolute resolve and come second to no other priority. For this reason, we fully support the President's authority to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. corporation that is determined to threaten the national security of the United States.

We also strongly believe that protecting U.S. national security and advancing America's global economic leadership are compatible and reinforcing goals. Indeed, we cannot achieve one without pursuing the other. In an increasingly interconnected world, the health and vitality of the U.S. economy – and, therefore, American jobs – depend on open markets and the free flow of capital. U.S. investments abroad support economic growth at home, access to resources and, in turn, national security. Similarly, foreign investment in the United States brings trillions of dollars of capital, new ideas, techniques, and methodologies – all of which promote U.S. economic growth, enhance our competitive position in the global marketplace, and help to create millions of American jobs. At present, more than 5 million American jobs can be directly tied to foreign investment in the United States. Indeed, when asked to rank 10 potential threats to the continued expansion of the U.S. economy in a survey the Forum conducted this past October, our 21 member CEOs ranked “protectionism” as the most serious threat – ahead of “terrorism.”

Unfortunately, in the wake of the Dubai Ports World controversy last year, securing approvals within the CFIUS process of foreign investments has become more difficult and is taking longer:

In 2006, there were 113 CFIUS filings (up 73 percent over 2005), 7 second-stage investigations (up 250 percent), and 5 withdrawals (up 150 percent). The dramatic increase in filings strongly suggests that foreign investors and their legal counsel are increasingly uncertain about U.S. approval requirements, leading them to more frequently file proposed transactions for CFIUS review, straining CFIUS' limited resources. The dramatic increase in the number of second-stage investigations and withdrawals further suggests that foreign investors are finding it more difficult to close deals in a commercially timely fashion.<sup>1</sup>

While mandated timetables have not changed, caution with CFIUS has resulted in longer review periods, causing a growing number of transactions to be withdrawn. Presidential approval of the Lucent-Alcatel merger, for example, came more than 7 months after the proposed merger was announced. Longer approval periods discourage foreign investors from investing in the United States, and discourage U.S. companies from considering foreign partners.

These developments are not good news for the U.S. economy. Limiting the pool of potential investors and buyers of American assets undermines the value of those assets, harming business owners, their workers, the interests of shareholders, and Americans with money invested in stocks, mutual funds, 401(k) retirement, and pension funds.

These developments are also contrary to U.S. security interests. Given CFIUS' limited resources, an overly cautious environment that encourages companies to file with CFIUS regarding transactions with little or no impact on national security distracts CFIUS staff from focusing on those proposed acquisitions with genuine national security implications and therefore legitimately requiring of greater scrutiny.

With these concerns in mind, we respectfully urge Congress to reject unwise and unnecessary new restraints on open markets and the free flow of capital as it considers possible reforms to the CFIUS process. Any changes should result from a thoughtful, considered, and fact-based assessment, and should seek to restore confidence, certainty, and predictability to the prospect of investing in America.

In my time before the Committee, I'd like to raise four points that we believe should guide Congressional consideration of reforms to the CFIUS process:

First, the vast majority of foreign acquisitions have no bearing on U.S. national security. 94 percent of foreign-owned U.S. assets are owned by companies from OECD countries, and 98 percent of foreign direct investment in the United States is from private sector firms. Expanding CFIUS' mandate beyond genuine national security concerns would create a major disincentive for foreign investment and have a negative impact on U.S. economic growth and job creation.

---

<sup>1</sup> See "Swinging the Pendulum Too Far: An Analysis of the CFIUS Process Post-Dubai Ports World," by David Marchick, The National Foundation for American Policy, January 2007

Second, successive Administrations of both political parties have for decades worked aggressively to establish a global rules-based system founded upon the principles of open investment and free trade. This continuity in policy has enabled America to prosper, assert a leadership role in the global economy, and advance our broader foreign policy and strategic interests. We risk eroding this prosperity and leadership position by adopting new laws which discriminate against foreign investment.

Third, the existing CFIUS process is fully capable of identifying and dealing with potential threats to our national security. Although we recognize the process has shortcomings – particularly with regard to communications with Congress – and that some reform may be warranted, existing law provides the President with sufficient authority to block any foreign acquisition or mitigate related national security concerns. Agencies represented on CFIUS have on numerous occasions affirmed their readiness to use the full authority of the law.

Finally, it is instructive that upon establishing CFIUS Congress wisely chose to insulate it from political influence. And, by imposing strict confidentiality requirements, Congress explicitly recognized the sensitivity of the data relevant to such transactions, from a national security and commercial standpoint. The rationale supporting both decisions is as valid today as it was two decades ago.

#### The Benefits to the U.S. Economy of Foreign Investment

Today, more than ever, the U.S. economy depends on foreign investment. U.S. subsidiaries of foreign-based companies employ more than 5 million Americans throughout all fifty states, paying compensation totaling \$325 billion annually.

Foreign companies also account for roughly 20 percent of all U.S. exports, 15 percent of private sector research and development, 10 percent of private-sector capital investments, and 12 percent of corporate taxes collected.

And when supplied with the facts, Americans clearly value the benefits of foreign investment, according to a survey we at the Financial Services Forum conducted recently. When asked about foreign investment in the United States, more than half of respondents indicated a favorable opinion. When told that more than 5 million American jobs were provided by foreign-based employers and that those jobs paid more than average, **61 percent** said they had a more favorable view of foreign investment. Of those that initially had an unfavorable view of foreign investment, better than a third (**39 percent**) said they had a more favorable view after hearing the economic benefits.

Open, stable, and predictable markets are a prerequisite for attracting global capital. While the United States is currently a favored destination for foreign investment, it is prudent to be mindful that markets in Europe and Asia are increasingly competitive. The introduction of a single currency in Europe has eliminated currency conversion costs and exchange rate risk, making Europe much more attractive. And with the Chinese and Indian economies growing at 9 and 6 percent respectively, those economies are already attracting enormous amounts of investment

capital. Indeed, in 2003, for the first time, China eclipsed the United States as the largest recipient of foreign direct investment

Global capital is sensitive to changes in the political climate. Poorly considered proposals to reform CFIUS would surely have a chilling effect on the inflow of foreign investment, with results that might well include higher interest rates, lower equity prices, and slower economic growth. Finally, it should be recalled that the United States is the world's largest investor, with over \$10 trillion in assets overseas. Erecting unreasonable barriers to participation in U.S. markets would likely invite retaliation by other countries, at great cost to U.S. interests.

#### The CFIUS Process

The Committee on Foreign Investment in the United States was established in 1975 with the purpose of evaluating the security impact of foreign investment. In 1988, the so-called Exon-Florio provision provided the President, following a review by CFIUS, with authority to block an acquisition of a U.S. business by a foreign person if the acquisition is determined to threaten the "national security" of the United States.

The process is initiated when parties to a proposed transaction file a voluntary written notice with CFIUS, or when a CFIUS member agency takes this action on its own. In either case, upon receiving this notification CFIUS begins a review of the transaction which lasts a maximum of 30 days. The process is terminated if CFIUS concludes at the end of this 30 day period that there are no national security issues warranting further review. In cases where a significant question of national security arises, CFIUS will undertake an investigation that may last a total of 45 days. At the end of this investigation, CFIUS provides a written recommendation to the President, who has 15 days to decide to approve or block the transaction. Therefore, a full CFIUS review cycle is 90 days. The President's decision is not subject to judicial review.

Since the enactment of Exon-Florio in 1988, CFIUS has reviewed over 1,600 foreign acquisitions of companies for potential national security concerns. Only one transaction has ended with a forced divestment. That case, in 1989, involved the purchase by CATIC, a company controlled by the Chinese government, of MAMCO, a small aerospace parts manufacturer in the state of Washington.

However, these figures do not reflect the full impact of the CFIUS process on addressing national security concerns raised by proposed foreign acquisitions of U.S. companies. For example, there are many instances in which CFIUS has worked with individual companies to devise security measures that precluded the need for a full investigation. Moreover, there have been many cases where parties voluntarily restructured a transaction to address national security concerns, or withdrew from the transaction altogether.

It should also be pointed out that it is relatively common for parties to a transaction to meet with CFIUS agency officials well in advance of filing a notice in order to explain the proposed transaction, provide information about the parties, and solicit comments from CFIUS members about their potential concerns. Therefore, the time necessary to consider potential national security implications of a transaction can be considerably longer than 90 days. In many cases, issues can be resolved before the notice is even filed. In others, this pre-filing consultation may

lead the parties to conclude that a transaction will not pass CFIUS review, in which case they may restructure their transaction to address national security concerns or abandon it entirely.

Since September 11, 2001, CFIUS has applied greater scrutiny to foreign investments on national security grounds, imposed stricter security requirements as a condition for approving specific transactions, and toughened enforcement of security agreements negotiated through the CFIUS process. There have been more investigations and withdrawals in just the past three years than during the previous decade. CFIUS has also significantly broadened the scope of its national security reviews. Prior to September 11<sup>th</sup>, CFIUS focused primarily on protection of the U.S. defense industrial base and the export of controlled technologies. Since then, CFIUS has intensified its focus on the additional goal of protecting critical infrastructure.

#### Proposals to Reform CFIUS

The Congress has a vital role to play in exercising its oversight authority to ensure that the CFIUS process is structured and implemented in a way that fully protects U.S. national security. Ultimately, CFIUS cannot be effective absent public confidence in its ability and willingness to do what is necessary to safeguard our security. To this end, we support more open communication between the Administration and Congress regarding the CFIUS process, so long as the confidentiality of proprietary information is protected.

We are very concerned, however, about proposals that would give Congress unprecedented new power to delay or overturn decisions by CFIUS. Legitimate national security concerns should be pursued vigorously, but introducing overt political considerations into the process would undermine investor confidence in U.S. markets and, consequently, reduce economic growth, threaten job creation, and jeopardize U.S. efforts to open foreign markets.

We are also troubled by proposals that would discourage foreign investment by requiring lengthy review periods, or proposals that, while intended to elevate national security scrutiny of foreign investments, might well prompt decision makers to disapprove meritorious investments that do not pose genuine national security threats.

In addition, the CFIUS process must retain a high degree of integrity and confidentiality. By its nature the CFIUS handles sensitive, proprietary information which relates to national security. Making this information accessible in the public domain could undermine the integrity of the CFIUS process and ultimately make it less effective in carrying out its primary mission of identifying and addressing transactions which implicate genuine national security concerns.

Of particular concern are proposals that would:

Provide for Congressional Disapproval of President's Decision: Proposals to grant Congress power to over-ride Presidential decisions regarding foreign investment would unnecessarily politicize the CFIUS review process. In addition, Congress is simply not best equipped for making sensitive, fact-based, case-by-case decisions. Congress makes law and oversees administrative procedure, but does not second-guess International Trade Commission (ITC) decisions or individual patent awards and should not do so with respect to CFIUS decisions.



Increase Required Time Periods for Review and Investigations: Proposals to require longer review or investigation periods stem from a perception that CFIUS reviews are cursory and not substantive, when the opposite is true. The necessary confidentiality of the CFIUS process reinforces this suspicion. These proposals would in many cases create an unacceptable level of risk and uncertainty for foreign investors, thus establishing a barrier to their participation in the U.S. market. They could also drive other countries to reform their rules for foreign investment to the detriment of U.S. companies seeking to invest overseas.

Require Unprecedented Notifications to the Congress and State Officials: Unprecedented notification and reporting requirements would increase the risk of politicizing transactions and allow competitors to achieve through politics what they could not in the marketplace. Such notification and reporting requirements would also create opportunities for information sent to Congress to be exploited for commercial purposes, rather than for advancing national security.

Expand the Scope of CFIUS to Include “Economic” Security: Reforms calling for CFIUS to expand the scope of its mandate to include “economic” security would provide grounds to block any and all foreign investment in the United States, and would overload CFIUS’ review process without enhancing national security. The existing national security factors in the CFIUS process are sufficiently broad to cover threats to American security. Such changes would also divert scarce government resources away from national security, the principal focus of the CFIUS process.

Summarily Deny Foreign Acquisitions or Ownership, Management or Operation of U.S. Critical Infrastructure: The CFIUS process should focus on legitimate national security concerns. Outright bans or significant restrictions on foreign ownership of significant sectors of the U.S. economy would have severe consequences not only for the health of the U.S. economy, but also the ability of U.S. companies, investors, and individuals to compete and invest abroad.

Mandatory Investigations of Acquisitions of U.S. Companies by State-Owned Entities: Again, the CFIUS process should focus on those acquisitions that raise genuine national security concerns, and CFIUS should have the discretion to determine which transactions raise legitimate concerns. As a recent transaction involving the Ontario Teachers Pension Fund illustrates, government ownership in and of itself is not a meaningful indicator of national security concerns. Mandatory investigations of acquisitions made by state-owned entities that in no way implicate national security concerns would be an unnecessary disincentive for foreign investment and use of government resources.

Evergreen Provision: A hospitable foreign investment environment requires procedural predictability and legal certainty – principles critically undermined by provisions that would allow for the re-opening and evaluation of an approved transaction sometime in the future.

Conclusion

Mr. Chairman, as reform alternatives are further deliberated, we urge Congress to take a thoughtful and measured approach – ever mindful of the critical importance to America and to the world of thriving global trading relationships. We urge Congress to keep America's markets open, even as it protects America's security.

Protecting national security and promoting foreign investment and free trade are not mutually exclusive. We can and must do both. Thank you for the opportunity to appear before the Committee.



[www.financialservicesforum.org](http://www.financialservicesforum.org)

**FOR IMMEDIATE RELEASE**

February 2, 2007

**CONTACT:** Taylor Griffin

(202) 457-8785

**SURVEY FINDS RISING SUPPORT FOR FOREIGN INVESTMENT**

*A Year After Dubai Ports, a Majority of Americans View Foreign Investment Favorably*

**WASHINGTON, DC** – As Congress begins to consider legislation to reform the Committee on Foreign Investment in the United States (CFIUS), a new survey conducted by the Financial Services Forum finds a more favorable view of foreign investment among the American public a year after the Dubai Ports debate.

***Public Support for Foreign Investment Rising***

Support for foreign investment has risen to **51 percent** in the most recent survey, conducted January 18-21, 2007, compared to **47 percent** in the previous survey conducted in April of 2006 in the wake of the Dubai Ports debate. More importantly, when told that foreign companies operating in the U.S. provide more than 5 million jobs, **61 percent** had a more favorable view of foreign investment compared to **52 percent** in the previous survey. Of those that initially had an unfavorable view of foreign investment **39 percent** had a more favorable view once they understood the economic benefits.

***Public Support for Foreign Investment Crosses Party Lines***

The survey also found that while Republicans tended to be somewhat more supportive of foreign investment generally (**54 percent favorable**) than Democrats (**45 percent favorable**), when respondents understood the number of jobs foreign investment creates, **66 percent** of Democrats had a more favorable view versus **59 percent** of Republicans.

***Public Still Concerned about Legislation if it Discourages Foreign Investment***

Public concern that legislation in Congress may discourage foreign investment remains steady at **57 percent** in the new survey; the same level measured last April.

“The results of the survey demonstrate the importance of CFIUS reform that returns certainty to the CFIUS process and protects national security while encouraging vital foreign investment that creates jobs and helps to strengthen our economy,” said Forum CEO Donald L. Evans. “We can achieve both priorities and the survey results demonstrate that is exactly the approach the public wants our leaders to take.”

A summary of the poll results is attached.

---

RT Strategies National Omnibus Poll  
Thomas Riehle and Lance Tarrance, Partners  
And  
Financial Services Forum Poll  
Conducted April 6-9, 2006 and January 18-21, 2007  
N = 1,000 adults nationwide, Margin of Error  $\pm$  3.1%

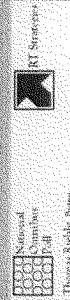
###



# Financial Services Forum

Foreign Investment \* January 18-21, 2007  
Survey of 1,000 Adults, 872 Registered Voters  
Nationwide

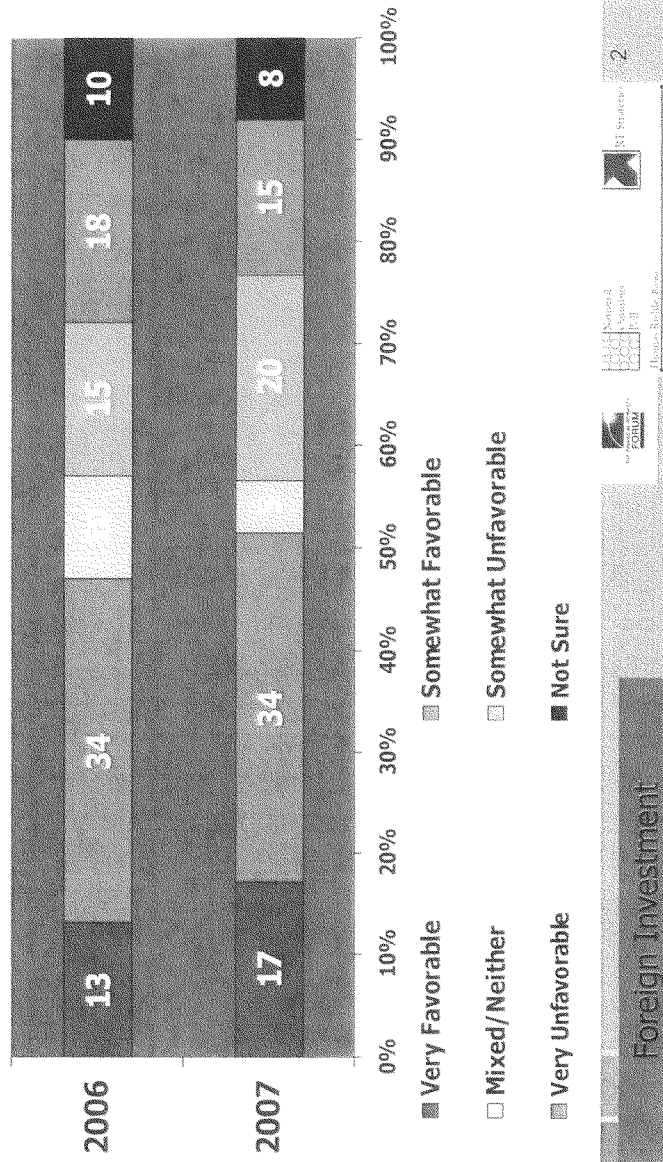
Margin of Error:  $\pm 3.1$  for all adults,  $\pm 3.3$  for registered voters



Foreign Investment

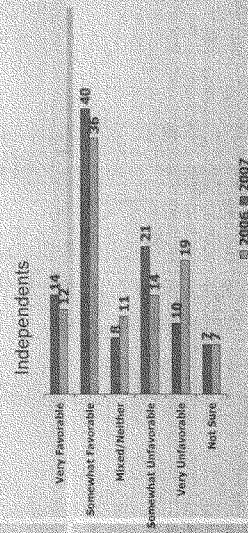
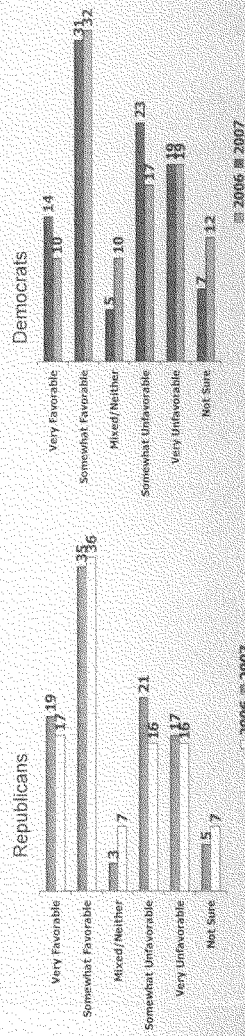
# Foreign Investment in the U.S.

Generally speaking, do you have a (ROTATE;) favorable OR unfavorable opinion of foreign investment in the United States - in other words, foreign companies or individuals who invest in the U.S. or operate businesses here. (IF FAVORABLE/UNFAVORABLE, ASK:) Is that very (FAVORABLE/UNFAVORABLE), or only somewhat (FAVORABLE/UNFAVORABLE)?



# Foreign Investment in the U.S.

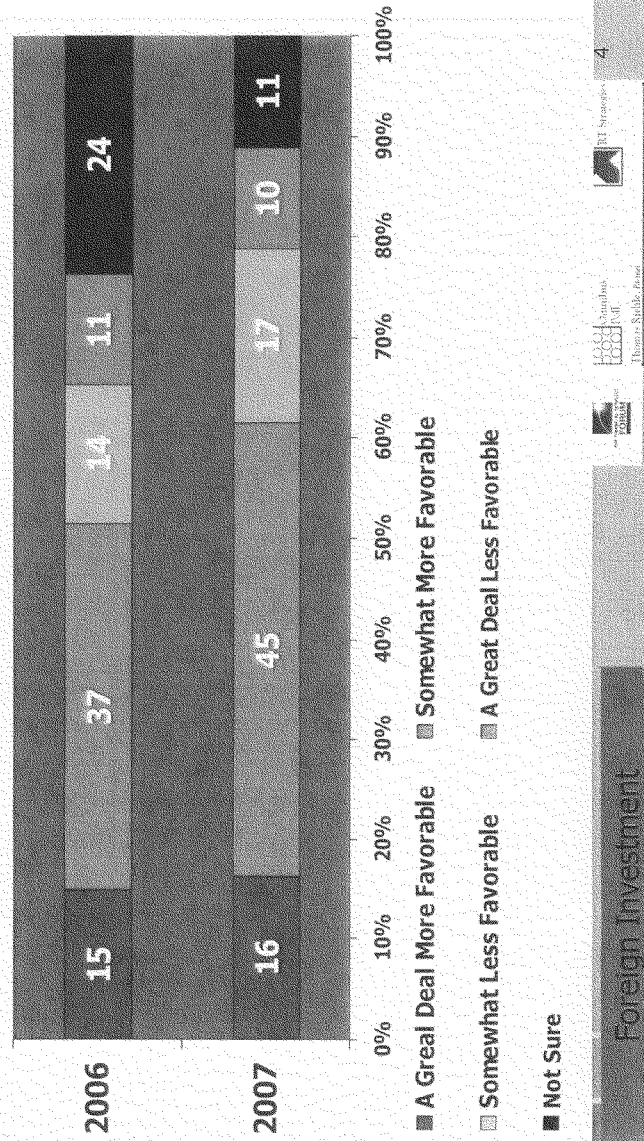
Generally speaking, do you have a (ROTATE) favorable OR unfavorable opinion of foreign investment in the United States - in other words, foreign companies or individuals who invest in the U.S. or operate businesses here. (IF FAVORABLE/UNFAVORABLE, ASK) Is that very (FAVORABLE/UNFAVORABLE), or only somewhat (FAVORABLE/UNFAVORABLE)?



Foreign Investment

# Foreign Company Employment

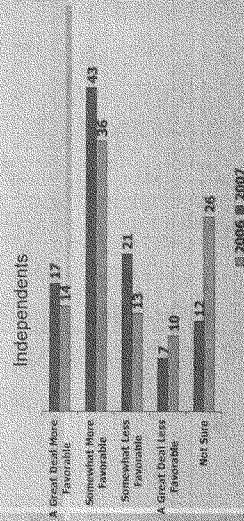
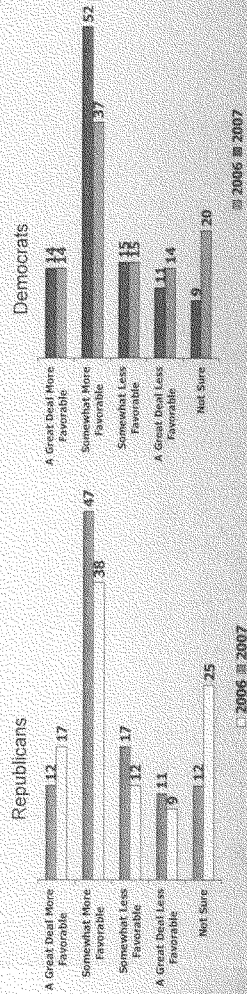
Economists report foreign companies operating in the U.S. today employ nearly 1 out of every 20 American workers — providing more than 5 million jobs that offer above-average pay of more than \$60,000 a year per worker, on average. Does hearing that make you feel (ROTATE) more favorable OR less favorable toward foreign investment in the United States? (IF MORE FAVORABLE/LESS FAVORABLE /ASK) Is that a great deal (MORE/LESS) favorable, or only somewhat (MORE/LESS) favorable?





# Foreign Company Employment

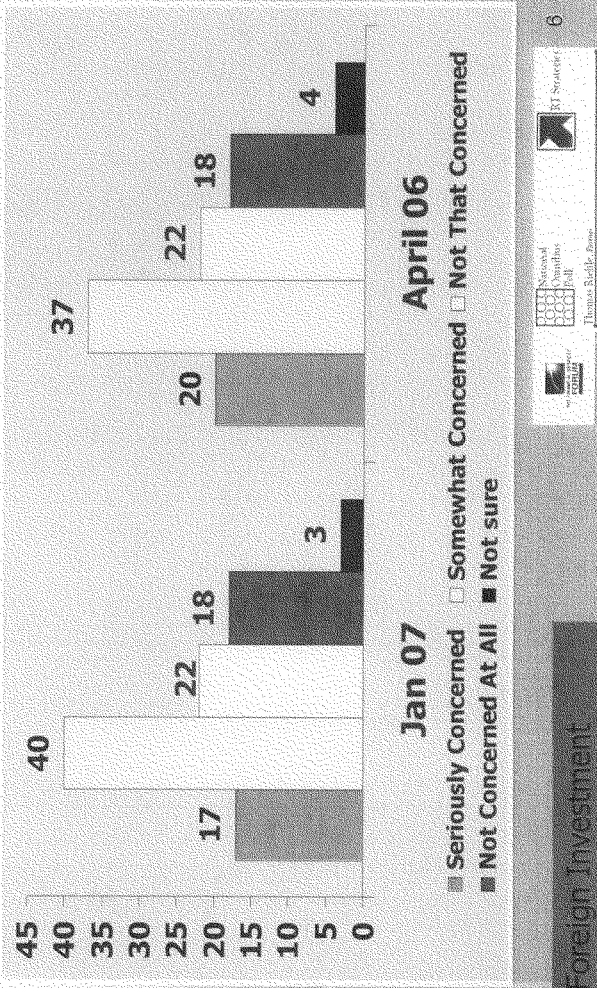
Economists report foreign companies operating in the U.S. today employ nearly 1 out of every 20 American workers — providing more than 5 million jobs that offer above-average pay of more than \$60,000 a year per worker, on average. Does hearing that make you feel (ROTATE) more favorable OR less favorable toward foreign investment in the United States? (IF MORE FAVORABLE/LESS FAVORABLE, ASK) Is that a great deal (MORE/LESS) favorable, or only somewhat (MORE/LESS) favorable?



Foreign Investment

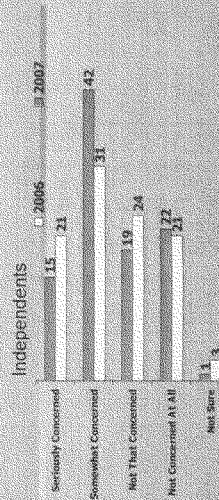
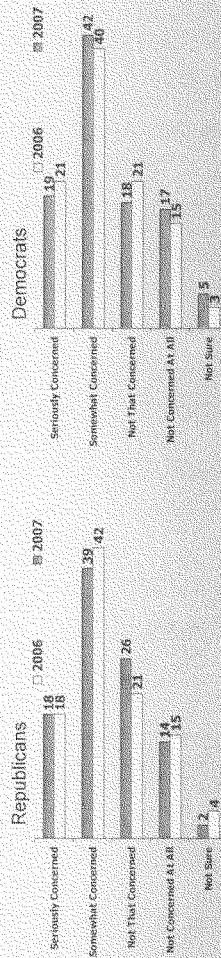
# Discouraging Foreign Investment

Turning now to the U.S. Congress – as a result of the controversy last year over the possibility that some U.S. ports might be managed by a foreign firm, Congress continues to consider proposals about the broader issue of foreign ownership and investment in the United States. Some say these kinds of proposals might discourage foreign investment or make investment in the U.S. less attractive. Considering the economic benefits of foreign investment we just discussed, how concerned are you that actions in Congress might make foreign investment in the U.S. less attractive?

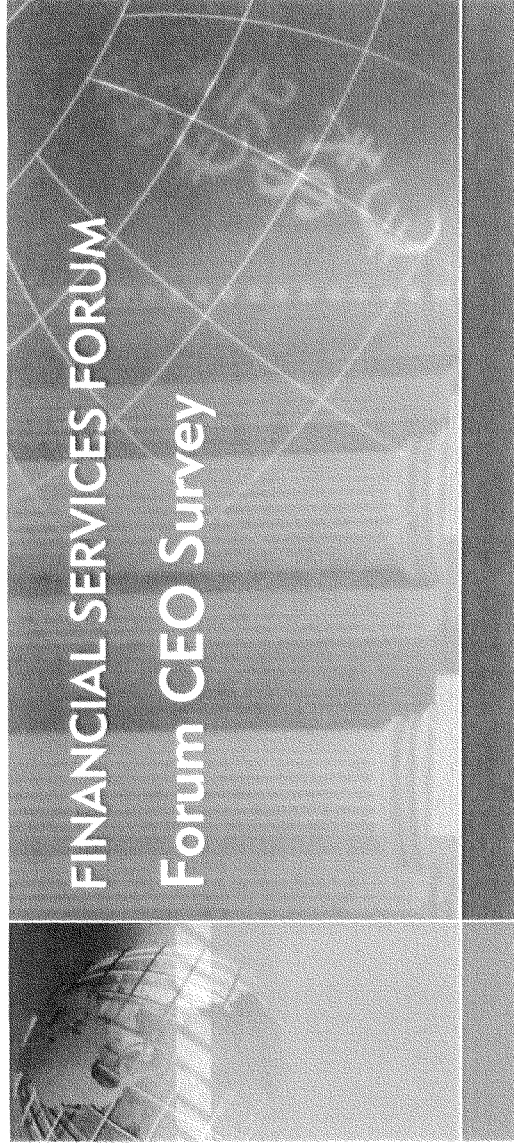


# Discouraging Foreign Investment

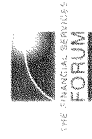
Turning now to the U.S. Congress — as a result of the controversy last year over the possibility that some U.S. ports might be managed by a foreign firm, Congress continues to consider proposals about the broader issue of foreign ownership and investment in the United States. Some say these kinds of proposals might discourage foreign investment or make investment in the U.S. less attractive. Considering the economic benefits of foreign investment we just discussed, how concerned are you that actions in Congress might make foreign investment in the U.S. less attractive?

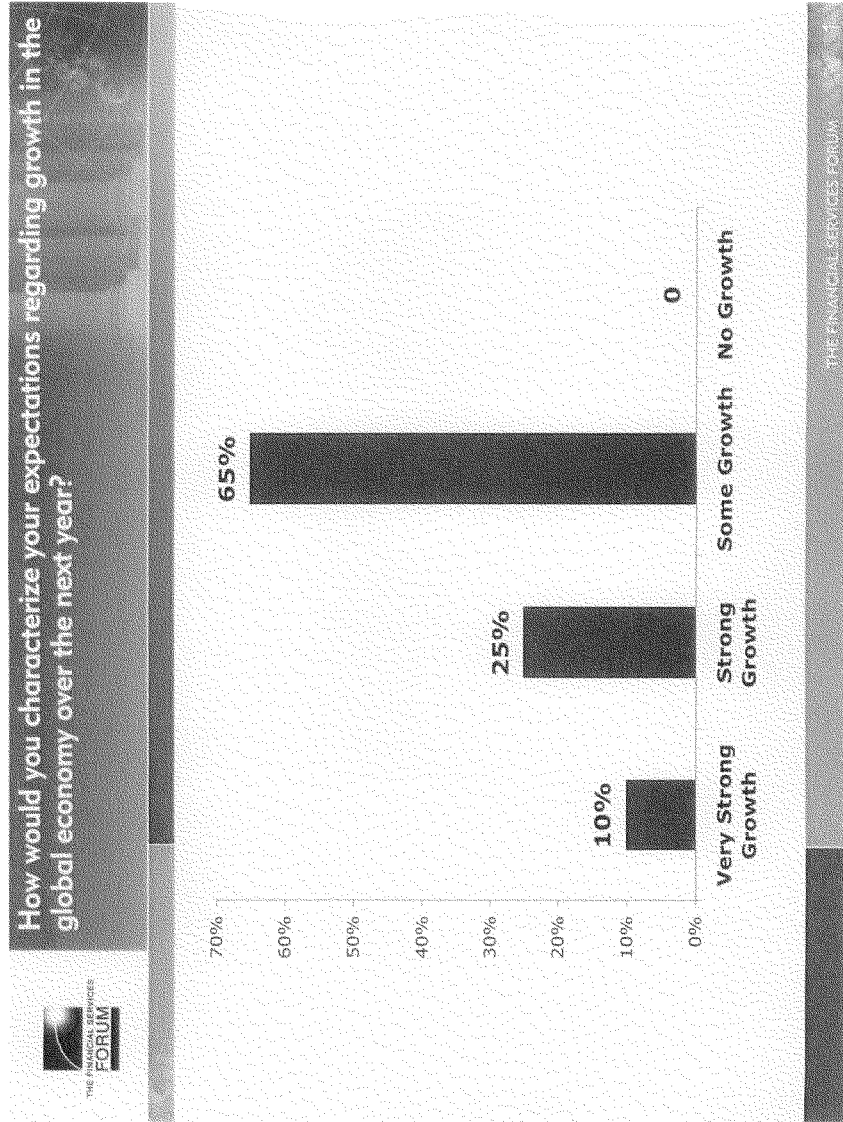


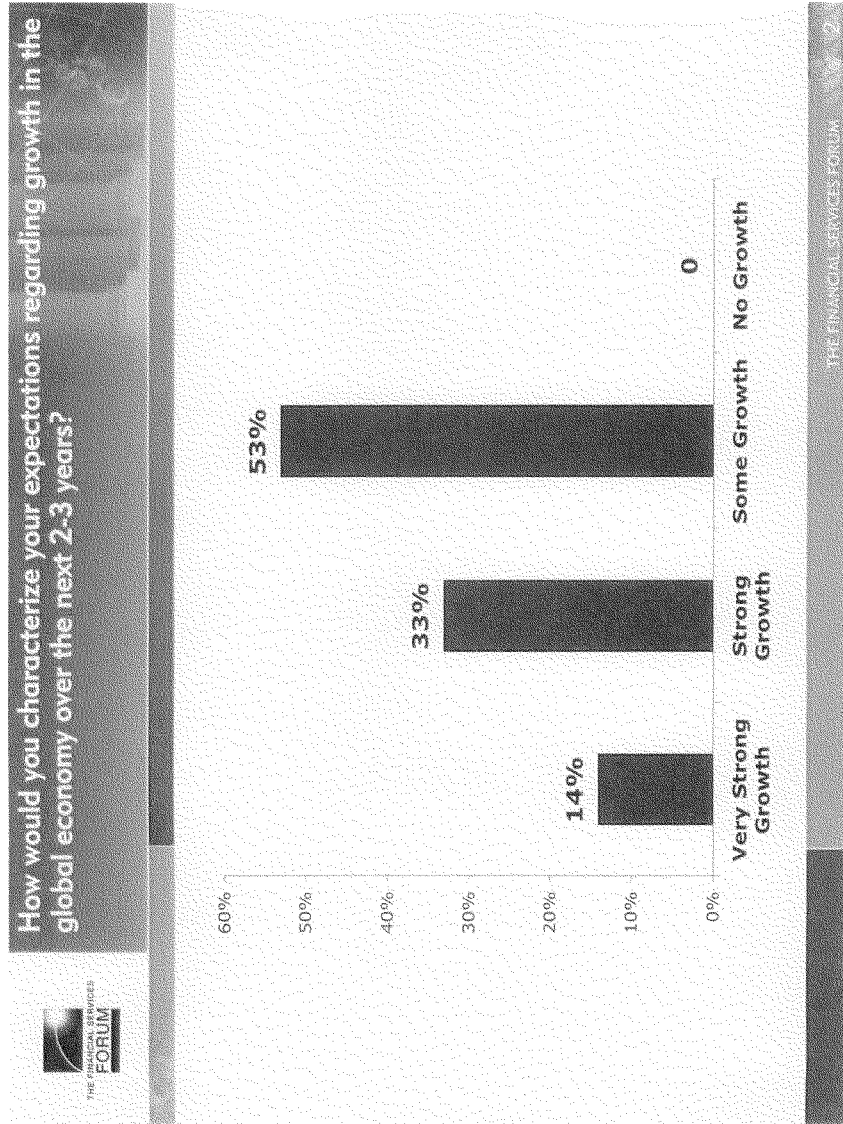
Foreign Investment



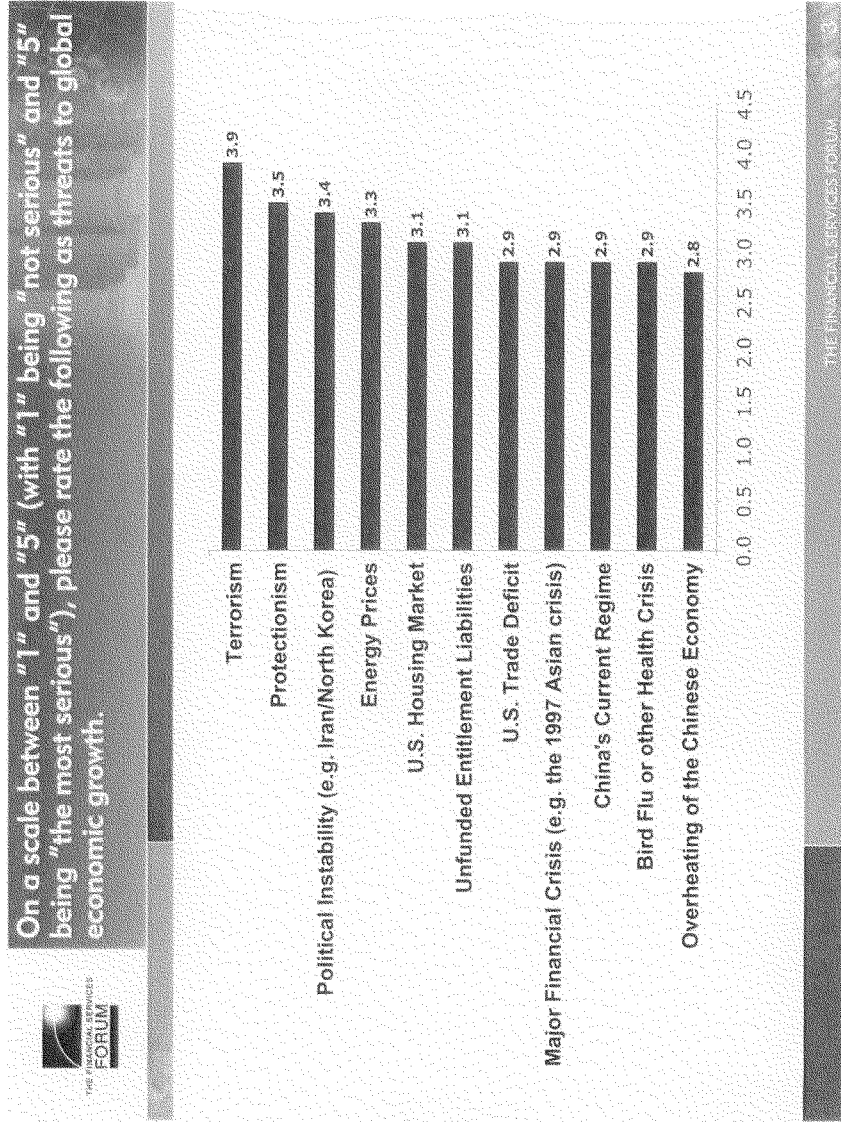
October 31, 2006





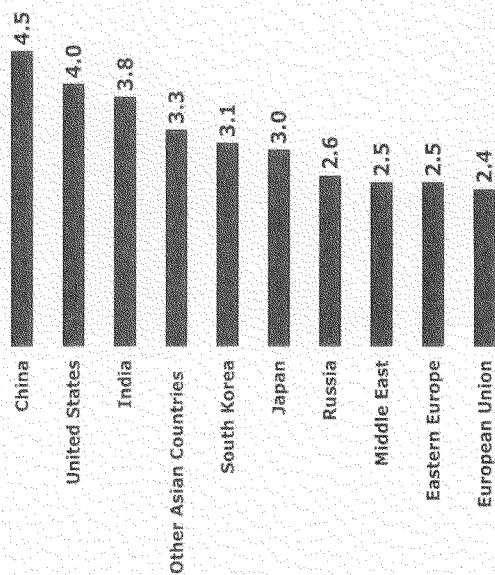




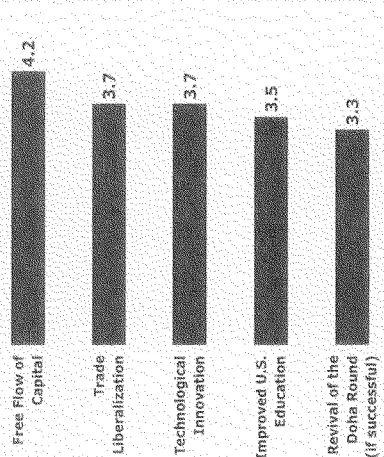


On a scale between "1" and "5" (with "1" being "not important" and "5" being "the most important"), please rate the following regions and economic factors in terms of their expected contribution to global economic growth over the next decade.

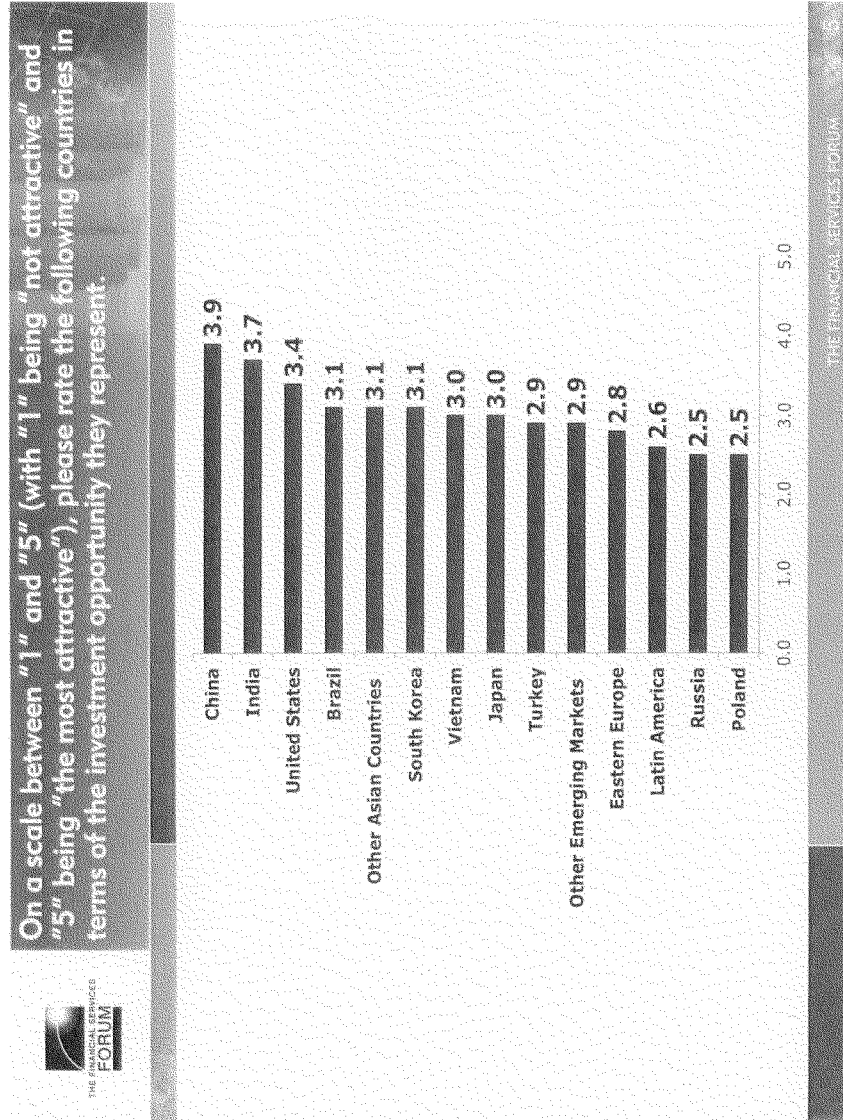
### Countries and Regions

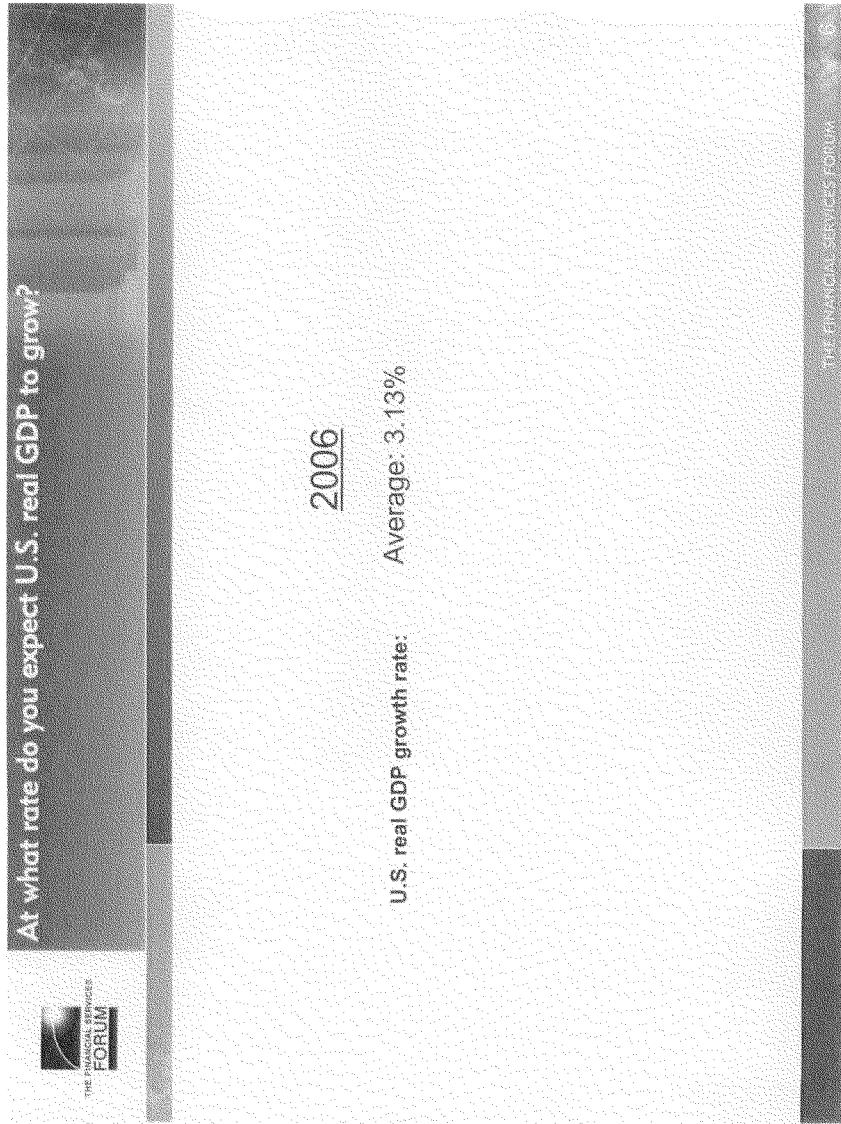


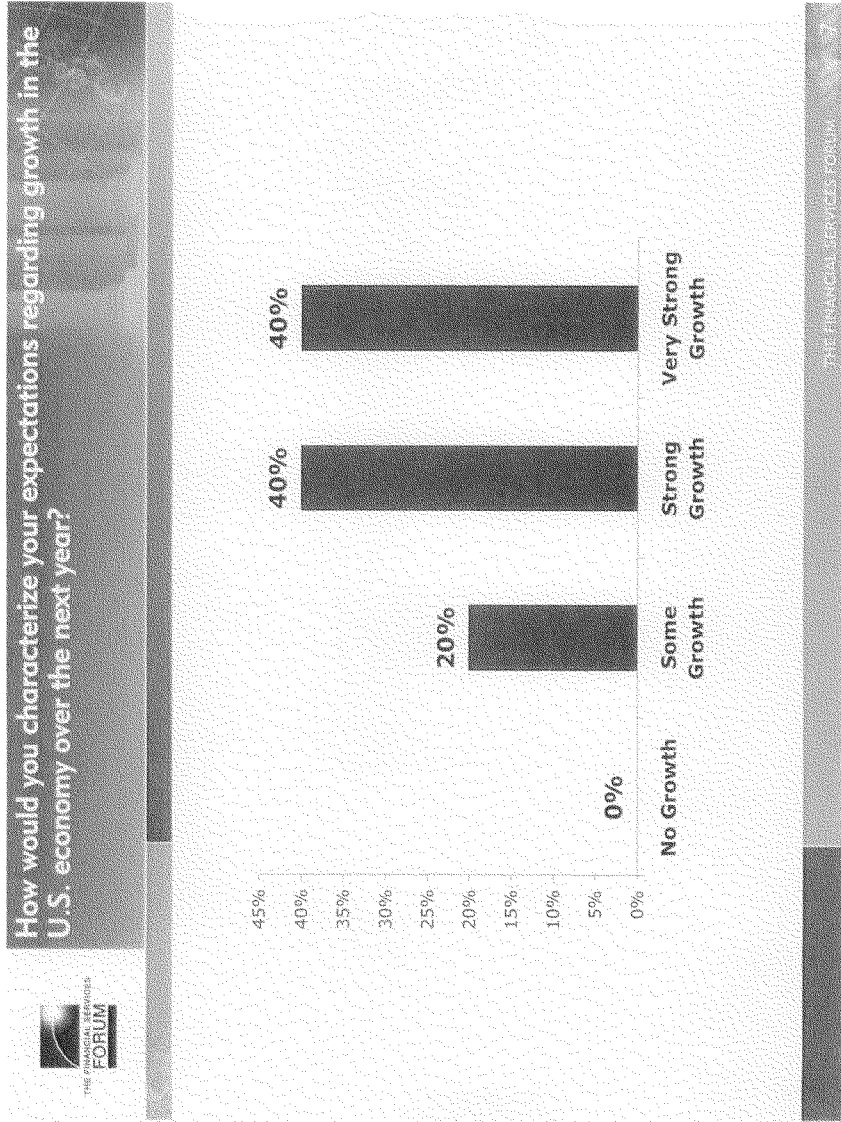
### Factors Affecting Growth

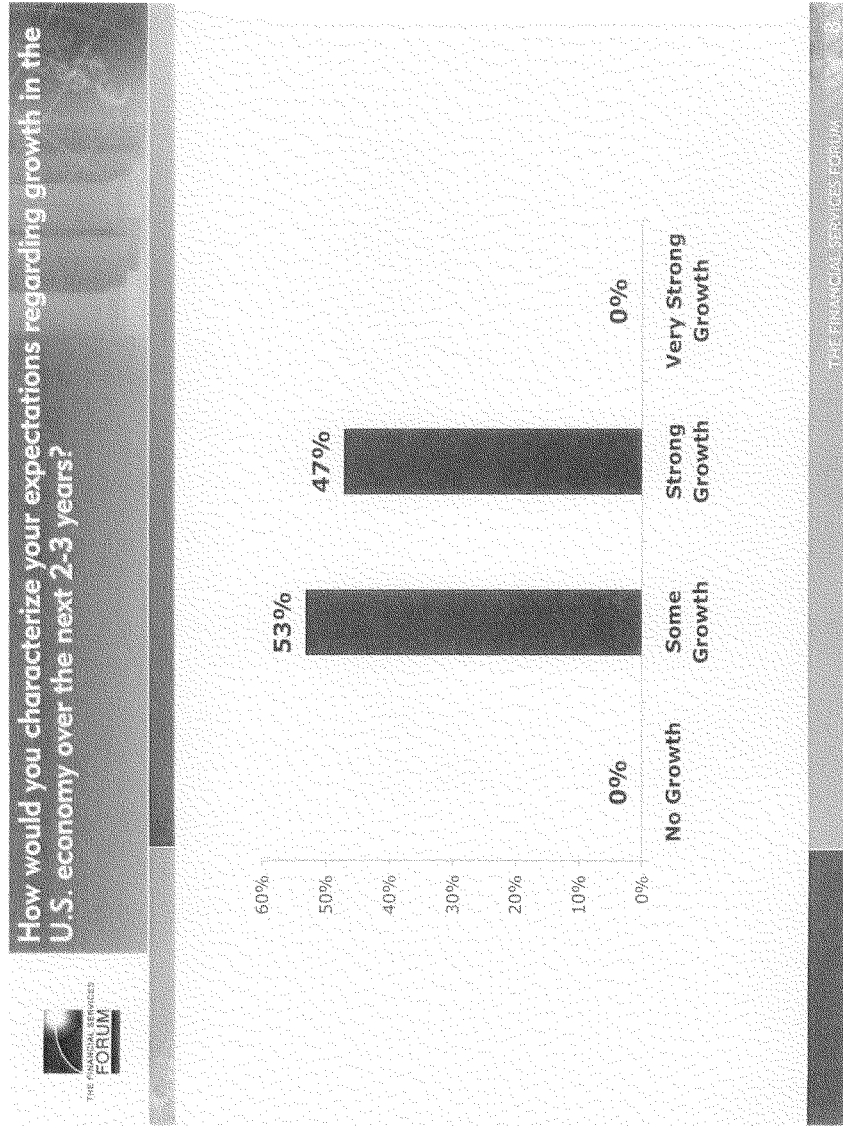














What is your expectation regarding the federal funds at year-end 2006? Year-end 2007?

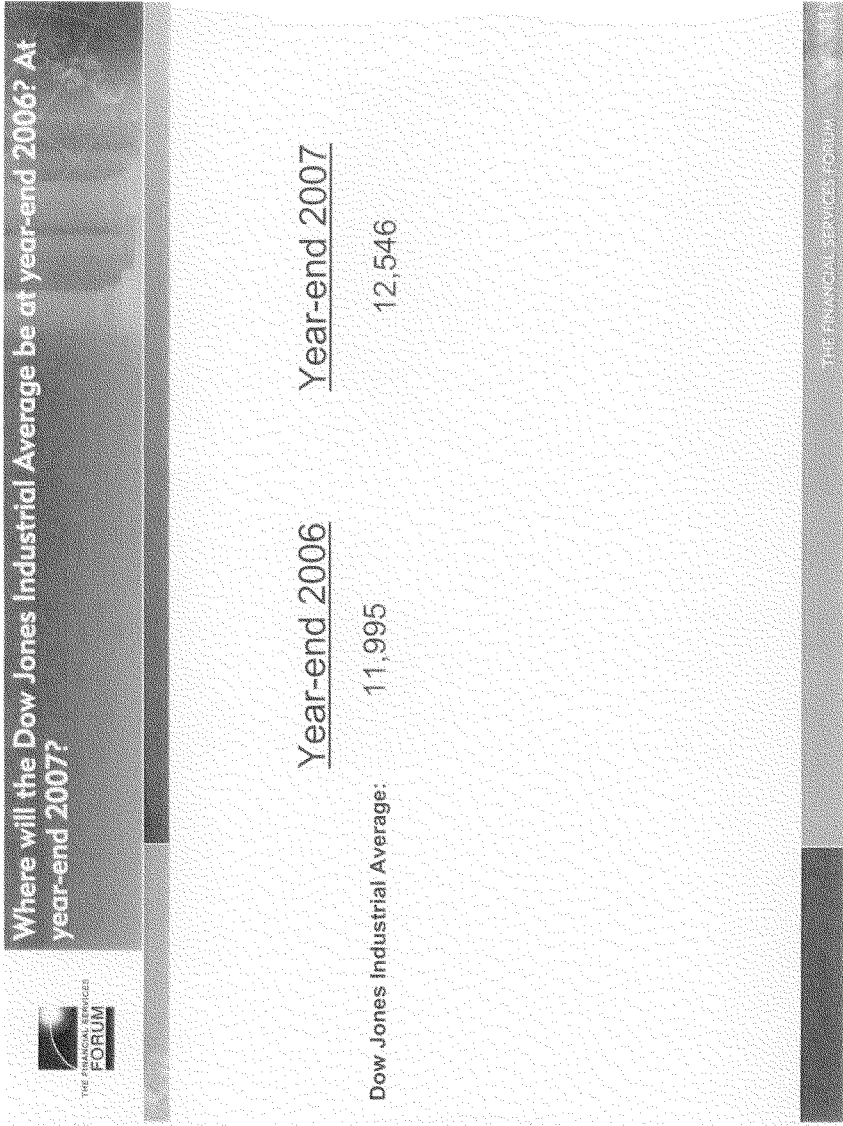
Year-end 2006

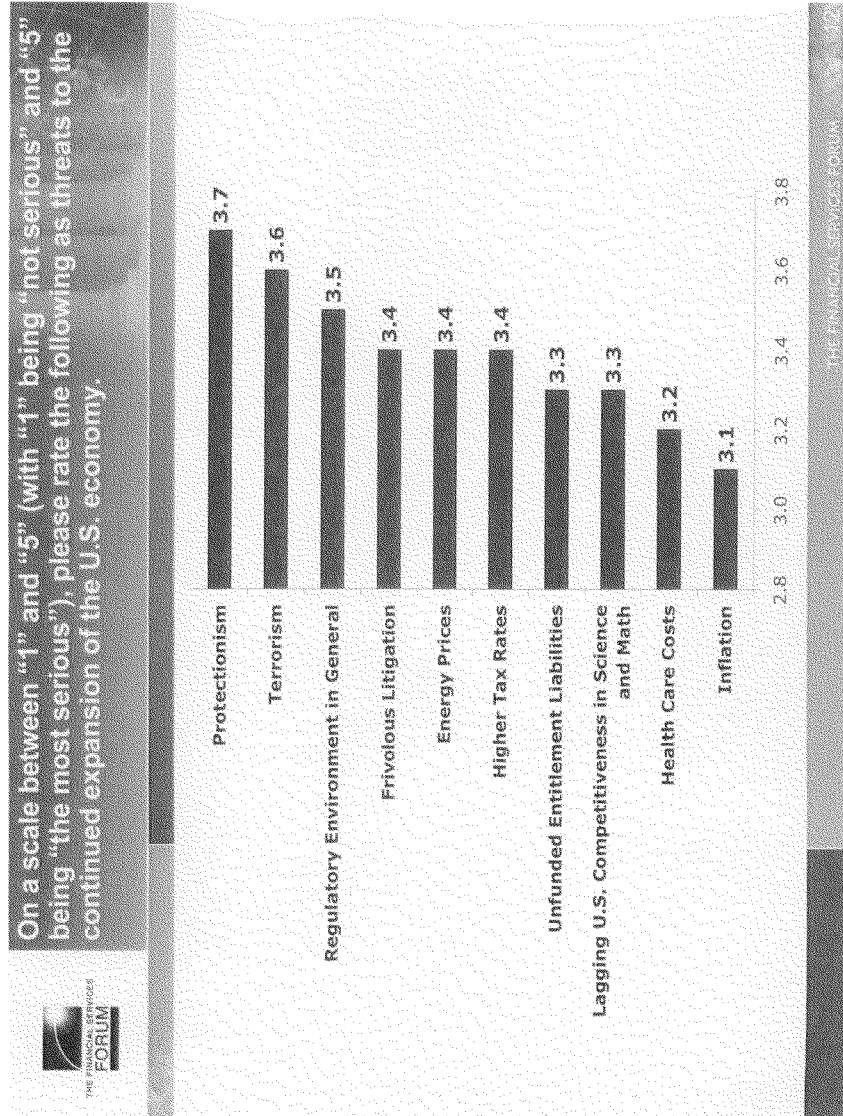
Federal funds rate:

Average: 5.25%

Year-end 2007

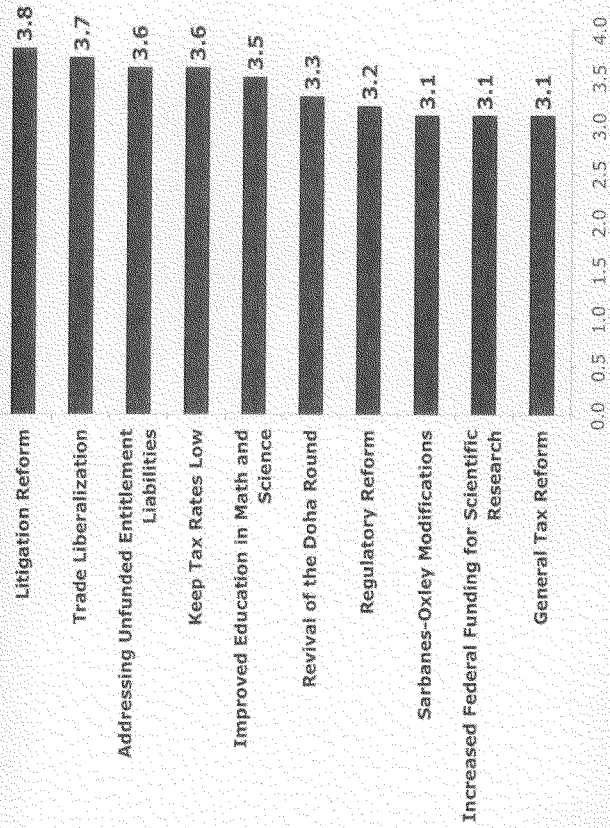
Average: 4.75%



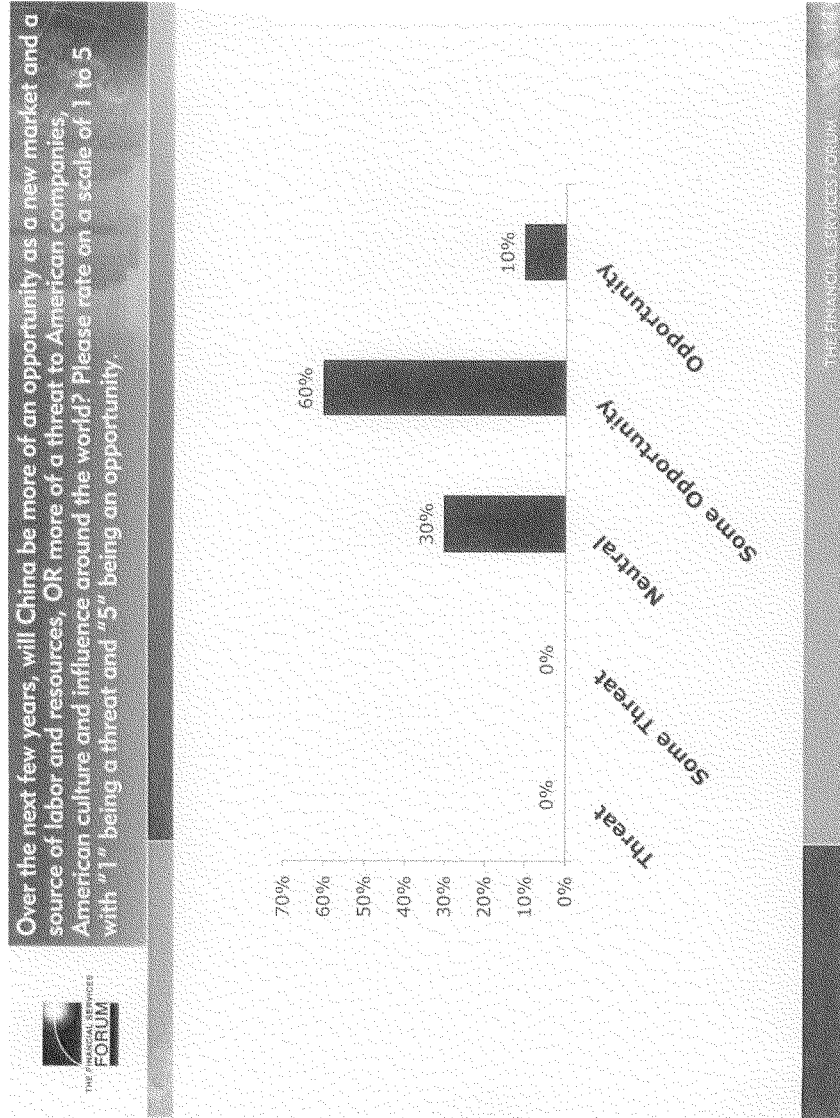


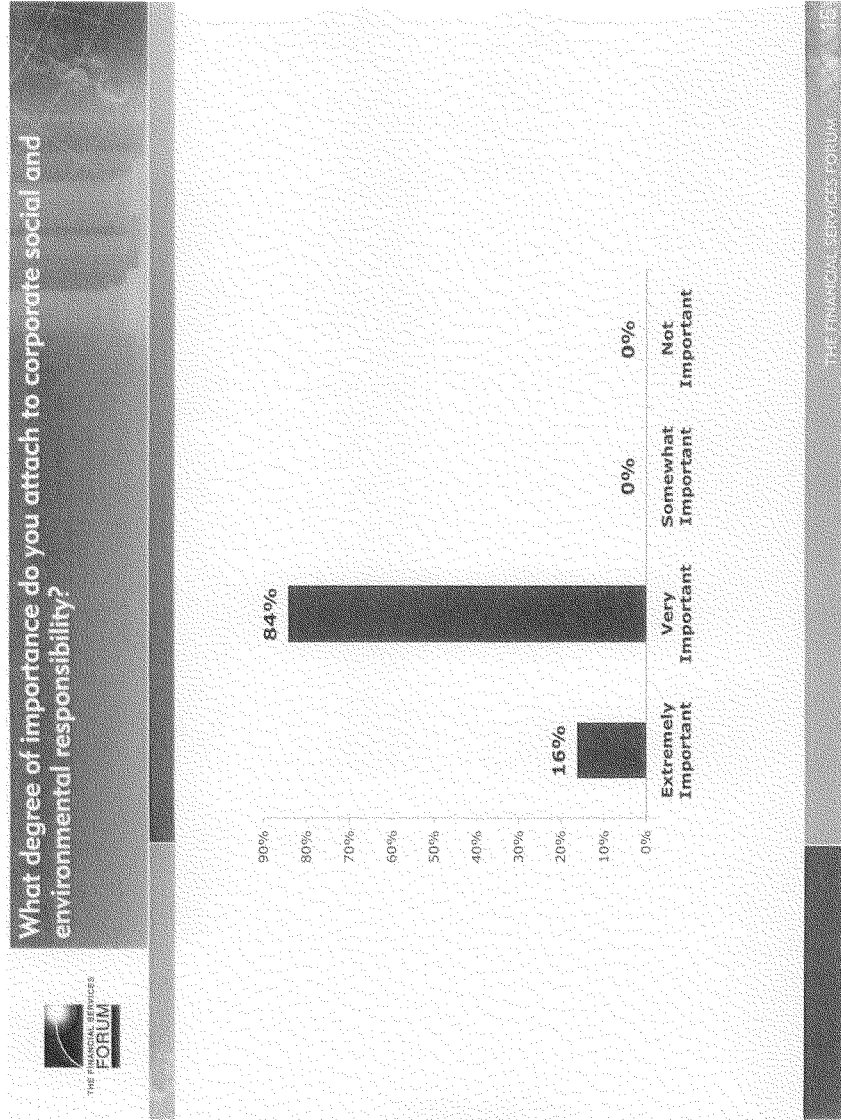


Please rate the following policy goals in terms of their value to continued U.S. economic growth and enhanced competitiveness, with 5 being the "most valuable" and 1 being "least valuable."









## NATIONAL SECURITY AND FOREIGN OWNERSHIP

Testimony before the Committee on Financial Services of the U.S. House of Representatives

February 7, 2007

Michael O'Hanlon, mohanlon@brookings.edu

In a globalizing world, in which America benefits economically and strategically from openness and trade and cross-border investment, what national security rules and guidelines should govern our interaction with other countries? The concern is particularly acute, not for close allies like Britain, not for clear adversaries like North Korea, but for more complex cases such as China and a number of states where al Qaeda has had a strong presence in the past.

A number of specific questions have arisen in recent years, in response to China's interest in obtaining the Unocal energy company, China's ongoing economic assertiveness in places such as Panama, Iran, and Sudan, and the United Arab Emirates' interest in managing operations at six U.S. ports. At what point, if any, are such developments dangerous for the United States? How do we figure that out in advance—so that we have appropriate legal frameworks for regulating such sales, and so that we avoid diplomatic brouhahas that harm relations with countries with which we are trying to construct cooperative partnerships?

There are a number of possible reasons for concern about changes in control of strategically significant industries. The most acute involve possible transfers (licit or illicit) of our highest technology, or developments that would open up our country to possible attack by compromising sensitive security procedures and allowing would-be enemies to learn about our nation's greatest vulnerabilities. Secondary, but still potentially real, concerns involve the possibility that we would develop major dependencies for strategically important goods or commodities on countries that ultimately might not prove to be dependable suppliers.

Using this framework, I would conclude unsurprisingly that our greatest economic/strategic vulnerability today comes from our dependence on foreign oil (with the issue of who drills, refines, and transports that oil secondary to the issue of where it is originally found). This is the dependency for which we have the least effective policy responses in place. Other concerns, which I develop further below in regard to the two recent cases of Unocal and Dubai Ports World, are of potential worry. But in general, our controls over transfer of high technology goods and our monitoring of foreign ownership of American strategic assets have been improving in regard to the recent developments discussed below. That said, more progress is essential, and Congress's interest in providing greater vigilance and oversight is welcome.

## THE BIG STORY OF 2005: CHINA AND UNOCAL

A Chinese company's interest in buying Unocal in 2005 raised a big question for the US: how much of our country do we want to sell to a potential adversary? Put more diplomatically, given that the US and China are not allies, and that China is the world's fastest growing economy: what rules should govern how we invest and trade with it?

Whatever the merits of the Unocal deal, it was a useful wake-up call. During the cold war, we developed criteria for determining when to worry if a key global resource or technology was found primarily behind the Iron Curtain. We have not had similar principles to guide relations with China. The proposed Unocal sale to CNOOC has pushed us to begin this debate.

In 2005, Brookings' vice president Lael Brainard and I proposed four benchmarks to assess how much economic dependence on China is too much.<sup>1</sup> The first concerns critical technologies. If China became the world leader in a major strategic technology, we would have to try to limit this trend. Crucial areas include high-energy lasers, advanced optics, submarine quieting equipment, stealth technologies and, perhaps of greatest concern in China's case, high-performance computers. While not trying to disrupt China's own legitimate advances, we should oppose transfers of advanced strategic western technologies to its ownership.

The second benchmark relates specifically to computer technology. Even if China does not become a leader in supercomputer development soon, it could easily become the dominant world producer of chips, computers or software. It is already the leading exporter of computers, with some 20 per cent of the global market already a couple years ago, although China's expertise is primarily in inexpensive production of lower-end machines. The world needs several suppliers of computer capabilities so that others can increase production if China cuts the US off in a future crisis; thankfully, we still have them. However, should the Chinese share of global computer trade increase by 50 to 100 per cent, more assertive policy measures could be required.

Meanwhile, preserving US leadership in the critical technology field demands more proactive domestic policies encouraging research and development, science and engineering education, and workforce training.

The third point relates to important natural resources. This is where oil and Unocal come in. The situation with essential energy sources can be more nettlesome than for a product such as computers, where others could increase production quickly if China ever threatened to cut its own off during a security crisis. China's share of global oil production is modest and well below what it needs for its own consumption—a useful benchmark for assessing potentially troublesome dominance. Unocal accounts for much less than 1 per cent of global oil production

---

<sup>1</sup> This is based in large part on Lael Brainard and Michael O'Hanlon, "A Test of American Independence," *Financial Times*, July 26, 2005.

(China's total assets account for well under 10 per cent). Rather than seeking domination of world oil markets, Chinese leaders probably wanted assurances over their energy supplies given their economy's extreme dependence on the resource. Moreover, given the amount of dollars we are putting in China's pockets through our enormous appetite for imports, we should not be surprised that Beijing would seek higher yielding investments than Treasury bonds. This deal did not happen, but it probably would have been just fine if it had.

The final benchmark is the question of overall economic dependence. Leaving aside the specifics about what trade the US carries out with China, it is not prudent to allow a huge share of the US economy to depend on favorable future political relations with one of the world's last great autocratic states. Although overall imports from China account for just 2 per cent of US gross domestic product, the nation depends heavily on China to finance its deficit. China's recent loosening of the renminbi did not change the situation dramatically. China would be exposed to hefty capital losses if it offloaded its dollar assets impetuously, but the degree of our dependence is still concerning, especially in the context of a possible future crisis over Taiwan.

The best way to address this problem is through fiscal policy and further exchange rate realignment, not trade or investment policy. As for owning US companies, China is a long way from buying up America. Its direct investment in the US in 2005 was less than \$1bn (about \$2bn counting investments from Hong Kong), compared with US investment in China of over \$15bn (\$60bn including Hong Kong)—and a very small fraction of the \$1,500 billion of total foreign investment in the US. One should remember that when Japan went on a US buying spree two decades ago, a sharp fall in the dollar and real estate valuations turned it into a bonanza for American sellers.

#### THE BIG ISSUE OF 2006: THE UAE AND DUBAI PORTS WORLD

Many U.S. observers were critical of the supposedly populist political reaction against the proposal by Dubai Ports World to take operational control of six American ports.<sup>2</sup> But real issues were raised by the idea of a company owned and operated by the United Arab Emirates gaining such direct access to a critical node of America's transportation underbelly. The opposition to the deal of former 9/11 commissioner Thomas H. Kean, a former governor of New Jersey, and at least one former official of the Department of Homeland Security also constituted a serious basis for taking the objections seriously on their substance, not just their politics.

Homeland security adviser Frances Townsend said to critics of the proposed deal on national television that there would be no notable difference between a British firm running the port operations in question and a UAE firm doing so. This statement was meant to suggest that only xenophobia could explain the actions of those who opposed the deal.

---

<sup>2</sup> This is based in part on Michael O'Hanlon, "Port Deal Raises Serious Concerns," *Baltimore Sun*, March 2, 2006.

That is too simple. Leave aside what we clearly remember about the UAE's behavior in the not-too-distant past: that it recognized the Taliban government of Afghanistan, that it was the country of origin for two 9/11 hijackers and a nexus for much of the funding needed to organize that plot, and that the proliferation network of Pakistani scientist Abdul Qadeer Khan used UAE territory as a transshipment point for sensitive technologies. Admittedly, these concerns were at least partially counterbalanced by the facts that the UAE has become a responsible player in port security on its own territory and that it has helped the United States substantially with intelligence cooperation and military bases in the war on terror.

However, existing policy draws a sharp distinction between close allies—allies such as Britain—and most of the world's other countries when it comes to vigilance against possible terrorism. Most relevant is the visa waiver program. Citizens from European states and a few other close allies need not have visas when coming to the United States; everyone else must. This suggests that we recognize that our close democratic partners, whatever their own foibles, have better procedures for monitoring the proper behavior of their citizens than most other countries and a better means of fixing problems that become apparent.

The policy also underscores the point that, however reputable UAE officials are, however trustworthy the DPW management team may be, however nonviolent most UAE citizens undoubtedly are, there are nonetheless far more al-Qaida members living in the Middle East than in most other parts of the world. Recognizing this does not make anyone racist. It is simply a fact. That means there is a serious case for drawing a distinction between ownership of port operations by a British, a Korean or even a Singaporean firm and one run by a company in the UAE. (Whether Chinese firms should run U.S. ports is another matter, but a largely separate one.)

The argument that DPW would not have responsibility for security operations at U.S. ports, which would remain in the hands of the Coast Guard and DHS, was partly right but incomplete. Any firm managing cargo at such ports would necessarily know a great deal about the port, its shipping practices and its potential vulnerabilities. And even if DPW's current management was, as I suspect, entirely dependable in not wishing to misuse any such information, what assurance would we have had that future employees hired into its management team would be as trustworthy?

I would that foreign ownership of key strategic assets allowing the potential for exploitation of key vulnerabilities needs to have different rules for countries like UAE than countries like the UK. And the visa waiver program is important here. Countries that we do not believe we can trust yet to monitor their own citizens need to create special, monitored procedures for vetting their citizens who would have access to sensitive information in any such future cases.

## CONCLUSION

Clearly a great deal has improved since 2005 and even 2006 in how the federal government thinks comprehensively about strategic vulnerabilities, trade, and investment. It is a privilege to be part of the conversation before this committee. And I will conclude by emphasizing a point made earlier: that our ongoing dependence on foreign oil, while not necessarily the main focus of this committee, strikes me as the chief unaddressed strategic economic vulnerability of the United States today.

